No. 15-338

Title:	Mark J. Sheriff, et al., Petitioners
	v.
	Pamela Gillie, et al.
Docketed:	September 17, 2015
Lower Ct:	United States Court of Appeals for the Sixth Circuit
Case Nos.:	(14-3836)
Decision Date:	May 8, 2015
Rehearing Denied:	July 14, 2015

Questions Presented

---Date---	-------Proceedings and Orders----------
Sep 15 2015	Petition for a writ of certiorari filed. (Response due October 19, 2015)
Oct 19 2015	Brief amici curiae of State of Michigan and 7 other States filed.
Oct 19 2015	Brief of respondents Pamela Gillie, and Hazel Meadows in opposition filed.
Oct 29 2015	Reply of petitioners Mark J. Sheriff, et al. filed.
Nov 4 2015	DISTRIBUTED for Conference of November 24, 2015.
Nov 30 2015	DISTRIBUTED for Conference of December 4, 2015.
Dec 7 2015	DISTRIBUTED for Conference of December 11, 2015.
Dec 11 2015	Petition GRANTED.
Jan 21 2016	Brief of respondents Eric Jones, et al. in support filed.
Jan 25 2016	Brief of petitioners Mark J. Sheriff, et al. filed.
Jan 25 2016	Joint appendix filed. (Statement of costs filed)
Jan 29 2016	SET FOR ARGUMENT ON Tuesday, March 29, 2016
Feb 1 2016	Brief amici curiae of State of Michigan and 11 Other States filed.
Feb 8 2016	Record requested from U.S.C.A. 6th Circuit.
Feb 9 2016	Record received from the U.S.C.A. 6th Circuit is electronic.
Feb 10 2016	CIRCULATED.
Feb 24 2016	Brief of respondents Pamela Gillie and Hazel Meadows filed. (Distributed)
Mar 2 2016	Brief amicus curiae of the United States filed. (Distributed)
Mar 2 2016	Brief amicus curiae of NHS Consumer Law Center filed. (Distributed)
Mar 2 2016	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 2 2016	Brief amici curiae of National Consumer Law Center, et al. filed. (Distributed)
Mar 2 2016	Brief amicus curiae of AARP filed. (Distributed)
Mar 2 2016	Brief amici curiae of 5 Consumer Law Professors filed. (Distributed)
Mar 17 2016	Reply of petitioners Mark J. Sheriff, et al. filed. (Distributed)
Mar 18 2016	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 22 2016	Reply of respondents Eric Jones and the Law Office of Eric A. Jones, LLC filed.

	(Distributed)
Mar 29 2016	Argued. For petitioners: Eric E. Murphy, State Solicitor of Ohio, Columbus, Ohio. For respondents: E. Joshua Rosenkranz, New York, N.Y.; and Sarah E. Harrington, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)
May 16 2016	Judgment REVERSED and case REMANDED. Ginsburg, J., delivered the opinion for a unanimous court
Jun 17 2016	JUDGMENT ISSUED

FILED
SEP 15 2015
OFFICE OF THE CLERK

15-338

No. 15-___

In the Supreme Court of the United States

MARK J. SHERIFF, SARAH SHERIFF, WILES, BOYLE, BURKHOLDER & BRINGARDNER CO., LPA, AND MICHAEL DEWINE, ATTORNEY GENERAL OF OHIO,

Petitioners,

v.

PAMELA GILLIE AND HAZEL MEADOWS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case asks whether Congress, through the Fair Debt Collection Practices Act, meant to interfere with the way in which a State engages in a sovereign function—its debt collection. Ohio requires its Attorney General to collect debts owed to the State. It authorizes the Attorney General to "appoint special counsel," in addition to employees, "to represent the state in connection with" this debt collection. The law requires that the Attorney General give special counsel the office's letterhead for use in collecting tax debts, and the Attorney General has read the law as giving him discretion over whether those counsel use that letterhead for other debts owed to the State.

The Fair Debt Collection Practices Act bars "debt collectors" from "us[ing] any false, deceptive, or misleading representation or means," 15 U.S.C. § 1692e, but expressly does not apply to "any officer or employee" of a "State to the extent that collecting or attempting to collect any debt is in the performance of his official duties," *id.* § 1692a(6)(C). In this case, a divided Sixth Circuit held that special counsel do not qualify for this state exemption and that a jury could find their use of state letterhead "misleading."

The case presents two questions:

1. Are special counsel—lawyers appointed by the Attorney General to undertake his duty to collect debts owed to the State—state "officers" within the meaning of 15 U.S.C. § 1692a(6)(C)?

2. Is it materially misleading under 15 U.S.C. § 1692e for special counsel to use Attorney General letterhead to convey that they are collecting debts owed to the State on behalf of the Attorney General?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Plaintiffs-Appellants below (and Respondents here) are Pamela Gillie and Hazel Meadows.

Defendants-Appellees below (and the Petitioners joining this Petition) are Mark J. Sheriff, Sarah Sheriff, and Wiles, Boyle, Burkholder & Bringardner Co., LPA. Defendant-Appellee Wiles, Boyle, Burkholder & Bringardner Co., LPA, has no parent company, and no publicly held company owns 10% or more of it.

Ohio Attorney General Michael DeWine (also a Petitioner joining this Petition) successfully moved to intervene in the district court as an Intervenor-Defendant, and was an Appellee in the Sixth Circuit.

Eric A. Jones and the Law Office of Eric A. Jones, LLC, were also Defendants-Appellees below.

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OPINIONS BELOW

The Sixth Circuit's denial of en banc review, Pet. App. 1a-17a, is unpublished. Its decision, Pet. App. 18a-76a, is reproduced at 785 F.3d 1091. The district court's decision, Pet. App. 77a-102a, is reproduced at 37 F. Supp. 3d 928.

JURISDICTION

On May 8, 2015, the Sixth Circuit issued its decision. On July 14, 2015, over the dissent of five judges, it denied petitions for rehearing en banc. This petition timely invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fair Debt Collection Practices Act (the "Act"), Pub. L. No. 95-109, 91 Stat. 874 (1977), defines "debt collector" to exclude "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." 15 U.S.C. § 1692a(6)(C). It prohibits debt collectors from engaging in "any false, deceptive, or misleading representation or means in connection with the collection of any debt." *Id.* § 1692e. The appendix to this petition includes relevant sections of the Act and of Ohio law.

STATEMENT OF THE CASE

A. The States' Prerogatives Regarding Debts Have Long Been Viewed As An Important Aspect Of Their Sovereignty

"From the founding, the States have taken debts—whether owed by them or to them—seriously." Pet. App. 55a (Sutton, J., dissenting). As for debts owed *by* them, sovereign immunity has

granted States "the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith." *Principality of Monaco v. Mississippi*, 292 U.S. 313, 324 (1934); The Federalist No. 81, at 549 (J. Cooke ed. 1961). Less well known, States have also invoked their sovereign status as the ground for many privileges regarding debts owed *to* them.

As one example, "there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown " *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1856). Magna Carta took this prerogative as a given, demanding only that the crown seek goods ahead of lands. Magna Carta, ch. 8, in 1 E. Coke, *The Second Part of the Institutes of the Laws of England* 18 (1797). Similar debt-collection methods were replicated "in the laws of the various American colonies and, after independence, the States." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 30 (1991) (Scalia, J., concurring in judgment); *Phillips v. Comm'r of Internal Revenue*, 283 U.S. 589, 595 & n.5 (1931). This Court upheld such procedures as applied against a U.S. revenue receiver. *Murray's Lessee*, 59 U.S. at 276-80.

As a second example, the crown viewed it as a sovereign "prerogative" to have its "debt paid before the debt of any subject." *Sir Edward Coke's Case*, 1 Godbolt 289, 290, 78 Eng. Rep. 169, 169-70 (Exch. 1653); 3 William Blackstone, *Commentaries on the Laws of England* 420 (1768). Most States "succeeded to [this] prerogative right" of priority under their common law. *U.S. Fid. & Guar. Co. v. Bramwell*,

217 P 332, 336 (Or. 1923); *Aetna Accident & Liab. Co. v. Miller*, 170 P. 760, 760-63 (Mont. 1918). "The Federal Government's claim to priority," by comparison, "rest[ed] as a matter of settled law only on statute." *United States v. Moore*, 423 U.S. 77, 81 (1975). This Court respected this state prerogative, finding it "enforceable against the property in the hands of a receiver appointed by a federal court." *Marshall v. New York*, 254 U.S. 380, 385 (1920).

As a third example, in perhaps the earliest use of the clear-statement rule, courts refused to interpret general bankruptcy laws as discharging debts owed to the crown. *Anon.*, 1 Atk. 262, 262, 26 Eng. Rep. 167, 167 (Ch. 1745); *Rex v. Pixley*, 1 Bun. 202, 202, 145 Eng. Rep. 647, 647 (Exch. 1726). States invoked the same rule—that the "sovereign" was not "named" and so "not bound"—when construing early bankruptcy laws as not discharging debts owed to them. *Commonwealth v. Hutchinson*, 10 Pa. 466, 468 (1849); *State v. Shelton*, 47 Conn. 400, 405-07 (1879); *Saunders v. Commonwealth*, 51 Va. 494, 496-98 (1853); *People v. Herkimer*, 4 Cow. 345, 348 (N.Y. Sup. Ct. 1825). This Court also followed that rule, noting that an intent to bind the United States must be "expressed in clear and unambiguous terms." *United States v. Herron*, 87 U.S. 251, 263 (1873). While bankruptcy laws now discharge some state debts, *Ohio v. Kovacs*, 469 U.S. 274, 278 (1985), this clear-statement rule lives on in the bankruptcy context, *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 50-51 (2008); *Kelly v. Robinson*, 479 U.S. 36, 47-49 (1986).

The aspect of sovereignty at issue in this case is more basic, but no less important, than these tradi-

tional prerogatives. The case does not ask whether a State may seize property, *Murray's Lessee*, 59 U.S. at 276-80, demand payment first, *Marshall*, 254 U.S. at 384-85, or prevent a debt's discharge, *Herron*, 87 U.S. at 263. It asks only whether a State may *notify* debtors that they owe debts to the State and that the counsel collecting the debts acts on behalf of the State's chief debt collector—its Attorney General. Treating a State's sovereign interest in its debt-collection methods as a "policy concern," a divided Sixth Circuit held that special counsel for Ohio's Attorney General could not convey that they sent letters on behalf of the Attorney General without risking massive liability. Pet. App. 38a.

B. Ohio Has Long Delegated The Duty To Collect Debts To Its Attorney General

1. *Attorney General's Office Structure.* In 1846, Ohio passed a law "[t]o create the office of Attorney General, and to prescribe his duties." 44 Ohio Laws 45, 46 (1846). From then until now, the Attorney General has routinely relied on "special" counsel to fulfill many official duties.

During the 1800s, the Attorney General had one employee, but could hire "local counsel" to assist in civil actions. Revised Statutes of Ohio § 202 (1890); 73 Ohio Laws 189, 191 (1876). By the 1900s, Ohio authorized the Attorney General to have six employees, but again gave the Attorney General broad "power to employ special counsel." 97 Ohio Laws 59, 60 (1904). Only later did the Attorney General obtain authority to "appoint such employees as he may deem necessary." 107 Ohio Laws 503, 504 (1917).

Today, Ohio broadly authorizes the Attorney General both to hire employees, Ohio Rev. Code § 109.05, and to appoint special counsel to "represent the state in civil actions, criminal prosecutions, or other proceedings in which the state is a party or directly interested," *id.* § 109.07 Specific statutes also permit the Attorney General to appoint either assistant attorneys general or special counsel for particular matters. *See, e.g.*, *id.* §§ 109.81 (antitrust); 109.84 (workers compensation); 119.10 (administrative proceedings); 2743.14 (court of claims); *see id.* § 124.11(A)(11) (noting that assistant attorneys general and special counsel are in the "unclassified service" of the State).

2. *Debt-Collection Duties.* When Ohio created the office, it gave the Attorney General the power to sue those "owing debts to the state." 44 Ohio Laws at 47. The Attorney General retains this duty today. Ohio Rev. Code § 131.02(A)-(C). State debts can range from tax debts, to educational debts owed to state colleges, to medical debts owed to state hospitals. Doc.24, Counterclaim, PageID#300.

Ohio employs a three-step process to collect these varied debts. At step one, the relevant state entity attempts to collect for 45 days. Ohio Rev. Code § 131.02(A). At step two, the entity certifies the debt to the Attorney General. *Id.* At step three, if the Attorney General concludes that the debt has become an "uncollectible" or "final overdue claim," the State may release the debt or sell it to a private party. *Id.* §§ 131.02(F)(1), 131.022(B).

At the second step, once a debt has been certified, "[t]he attorney general shall give immediate notice by mail or otherwise to the party indebted of the na-

ture and amount of the indebtedness," and "collect the claim or secure a judgment and issue an execution for its collection." *Id.* § 131.02(B)(1), (C). The Attorney General undertakes these tasks through employees in the Collections Enforcement Section and special counsel. Since 1937, the office has been permitted to "appoint special counsel to represent the state" in connection with debts "certified to the attorney general," and to pay counsel out of the funds they recover. *Id.* § 109.08; 117 Ohio Laws 304, 304-05 (1937). This debt-collection duty requires significant effort. To put it in perspective, from July 2011 to June 2012, the office collected over $466 million in debts—$191 million of which came through special counsel. Doc. 24, Answer, PageID#306.

This case concerns special counsel's use of Attorney General letterhead when communicating with debtors. In 1989, Ohio passed a tax law "popularly referred to as the Ohio Taxpayers' Bill of Rights." Anthony L. Ehler and Randall A. Osipow, *Am. Sub. S.B. 147: Ohio Taxpayers' Bill of Rights*, 3.5 Ohio Tax Review 10, 10 (Sept./Oct. 1989). The law granted taxpayers certain rights against the State. 143 Ohio Laws 877, 879-86 (1989). As relevant here, one section directed the Attorney General to "provide to the special counsel appointed to represent the state in connection with [certain tax] claims the official letterhead stationery of the attorney general." *Id.* at 877 (codified at Ohio Rev. Code § 109.08). It *required* special counsel to "use the letterhead stationery, but only in connection with the collection of such claims arising out of those taxes." *Id.* The next section directed the Attorney General to appoint "problem resolution officers" to handle concerns from tax debtors about employees "or the special counsel assigned to

the case." *Id.* at 877-78 (codified at Ohio Rev. Code § 109.082).

The Attorney General has interpreted Ohio Revised Code § 109.08—that special counsel "shall" use the letterhead for tax debts, but only with respect to those debts—as requiring special counsel to use that letterhead for tax debts, and leaving it to the Attorney General to decide whether special counsel use that letterhead for other state debts. The Attorney General has likewise interpreted Ohio Revised Code § 109.082—that problem resolution officers "shall" handle tax-debt concerns—as requiring the Attorney General to appoint officers to handle tax complaints, but leaving it to the Attorney General to allow them to handle non-tax inquiries. Plaintiffs have "categorically den[ied]" challenging what the Attorney General's Office believes to be a longstanding view of state law. Doc.31, Answer, PageID#333; *cf. Cleveland State Univ. v. Mills*, No. 2007-01517, Pet. for Removal, Exh. (Ohio Ct. Cls. Jan. 19, 2007) (use of letterhead of former Attorney General Jim Petro), *available at* http://cases.ohiocourtofclaims.gov/cgi-bin/wspd_cgi.sh/streamfile.p?Serial=07011900106271 3&Seq=1.

3. *Contracts with Special Counsel.* During the relevant period, special counsel applied for one-year contracts with the Attorney General's Office. Doc. 48-12, Wiles Application, PageID#723-77. The contracts contained terms regarding special counsel's interactions with the Attorney General's Office and with debtors.

As for special counsel's relationship with the office, they were appointed "to provide legal services on behalf of the Attorney General to assist in the collec-

tion of past due debt." Doc. 48-8, Contract, PageID#635. They were independent contractors, not employees, and had to purchase their own insurance. *Id.*, PageID#635, 644. They also agreed to abide by public-records laws. *Id.*, PageID#637 (citing Ohio Rev. Code § 149.43). The Collections Enforcement Section assigned claims to special counsel. *Id.*, PageID#636. Before initiating litigation or settling, counsel agreed to obtain the office's approval. *Id.*, PageID#638. The office also retained the right to terminate special counsel at any time. *Id.*, PageID#642.

As for special counsel's dealings with debtors, the contracts required special counsel, "[i]n all pleadings, notices and/or correspondence," to make clear that the document was "prepared by the Special Counsel in its position as Special Counsel for the Attorney General." *Id.*, PageID#635. The Attorney General also "expect[ed] Special Counsel to provide services to the public in a manner that will preserve or enhance goodwill between the public and the State," and had "zero tolerance" for actions demonstrating "less than complete respect for the rights and reasonable expectations of the public." *Id.*, PageID#645-46. Special counsel had to follow "the same standards of behavior as set forth in" the Act. *Id.*, PageID#634, 646.

C. Plaintiffs Alleged That Special Counsel's Use Of State Letterhead Violated The Act, But The District Court Disagreed

1. For 2012 to 2013, the office appointed Mark Sheriff, an attorney with Wiles, Boyle, Burkholder & Bringardner Co., LPA, as one special counsel. Pet. App. 25a. In earlier years, Bruce Burkholder had been special counsel at Wiles. Doc.60-2, M. Sheriff

Aff., PageID#1080. In 2007, Burkholder filed suit against Plaintiff Hazel Meadows, a University of Akron graduate, to recover a debt owed to the university. *Id.* Meadows agreed in a judgment entry signed by her counsel to make monthly payments on this $4,500 debt. *Id.* Ex. B, PageID#1083. She made timely payments thereafter. Doc.60-1, S. Sheriff Aff., PageID#1077

In July 2012, Sarah Sheriff, a Wiles employee, remembers fielding a call from Meadows "ask[ing] [Sheriff] for her balance." *Id.*, Page ID#1078. Sheriff sent a letter identifying the balance. Pet. App. 17a. The letterhead identified the office's Collections Enforcement Section. *Id.* The body read: "Per your request, this is a letter with the current balance owed for your University of Akron loan that has been placed with the Ohio Attorney General. Feel free to contact me should you have further questions." *Id.* Sarah Sheriff signed the letter; under her name was the firm's name and address; under the address was the notation "Special Counsel to the Attorney General." *Id.* Because Sheriff was responding to Meadows, she did not think it mattered who signed the letter. Doc.60-1, S. Sheriff Aff., PageID#1078.

"Though the letter said it was in response to [Meadows's] request for information," Meadows asserted that she did not "recall ever asking anyone for any information about this matter." Doc.48-3, Meadows Aff., PageID#612. The letter allegedly "scared [her] because [she] thought that the Ohio Attorney General might charge [her] with a crime for not paying what he said [she] owed." *Id.*, PageID#613. She took the letter to her attorney, and says that she sought counseling for stress. *Id.*

2. The Attorney General appointed Defendant Eric Jones as special counsel for July 2011 to June 2012. Pet. App. 25a. On May 24, 2012, Jones sent Plaintiff Pamela Gillie a letter with Attorney General letterhead. Pet. App. 14a. The letter included a numerical "balance." Its body said: "You have chosen to ignore repeated attempts to resolving the referenced medical claim. If you cannot make immediate payment call Denise Hall at Eric A. Jones, L.L.C., at my office to make arrangement to pay this debt." *Id.* Jones signed the letter as "Outside Counsel for the Attorney General's Office." *Id.* His return address was listed on the bottom. *Id.*

Gillie alleged that she was confused why Jones sent a letter for the Attorney General, and thought it might be a scam because it asked to send money to a private firm. Doc.48-1, Gillie Aff., PageID#609. Having filed for bankruptcy, Gillie allegedly also feared that "the Attorney General might garnish my wages" or "somehow stop or delay my bankruptcy case." *Id.* Like Meadows, she contacted her attorney about the letter. *Id.*, PageID#610.

3. Plaintiffs brought a putative class action against Mark Sheriff, Sarah Sherriff, and Wiles, and Jones and his firm, alleging that the use of state letterhead violated 15 U.S.C. § 1692e. Doc.1, Compl., PageID#16-19. The complaint alleged that the Attorney General had assigned over $13 billion in debts to special counsel and that the class might expand to hundreds of thousands of debtors if Plaintiffs added additional counsel. *Id.*, PageID#12.

The Attorney General moved to intervene because the suit threatened his ability to retain qualified counsel. Doc.4, Mem., PageID#61. He also moved to

stay proceedings for a state case or to have initial issues immediately resolved. Doc.7, Mem., PageID#97 The district court granted the motion to intervene. Doc.23, Order, PageID#278. It bifurcated proceedings in response to the stay motion, deciding whether special counsel were "debt collectors" and whether the letterhead was misleading before all else. Doc.42, Order, PageID#480-83.

After both sides moved for summary judgment, the court ruled for Defendants. Pet. App. 78a. *First*, it found that special counsel were not debt collectors because they fell under 15 U.S.C. § 1692a(6)(C)'s exception for government "officers or employees." Pet. App. 84a-90a. The Dictionary Act defined "officer" as "'any person authorized by law to perform the duties of the office.'" Pet. App. 87a (quoting 1 U.S.C. § 1). This definition applied, the court found, because the Attorney General bore the duty to collect state debts, and a statute authorized special counsel to assist him in that duty. *Id.*

Second, the court found nothing "misleading" under 15 U.S.C. § 1692e about special counsel's use of state letterhead. Applying a "least-sophisticated consumer" test, it rejected the argument that the letterhead "misleads consumers as to the source of the debt collection letters and falsely implies that the letters are from the [Attorney General's Office] instead of special counsel and their law firms." Pet. App. 91a. The court noted that "[t]he letters accurately reflect [the] relationship" of special counsel to the Attorney General. Pet. App. 96a. It added that the letter from Sarah Sheriff required "additional analysis" because Mark Sheriff was special counsel. *Id.* Since the letter merely responded to an inquiry and was

not otherwise inaccurate, the court held, it was not "materially misleading." Pet. App. 97a.

D. A Divided Sixth Circuit Reversed

1. Rejecting the district court's two rationales, a split Sixth Circuit reversed for trial. Pet. App. 20a.

Starting with the state exemption, the majority held that special counsel met neither requirement for "officer" status under the definition requiring them to be "authorized by law" to perform "the duties of the office." Pet. App. 28a-44a. As for "authorized by law," the majority held that a contract, not a law, gave special counsel the authority to collect debts. While Ohio Revised Code § 109.08 authorized the Attorney General to appoint special counsel, the majority construed "authorized by law" to reach only laws immediately authorizing conduct without more. Pet. App. 31a. Alternatively, the court interpreted "duties of the office" to require an individual to be permitted to perform *all* duties, not just *one*. Pet. App. 35a.

The majority added three general points about the exemption. It cited cases holding that independent contractors were not "officers." Pet. App. 36a-38a. It rejected the dissent's reliance on the "clear-statement rule" applied in cases like *Gregory v. Ashcroft*, 501 U.S. 452 (1991), because "[t]his case is about third-party debt collectors" and "Ohio is not being regulated; nor is the structure of its government being challenged." Pet. App. 39a. And it stated that special counsel would not qualify as "officers" under various state laws. Pet. App. 39a-42a.

On the merits, the majority noted that the Act bars statements that have a "tendency to confuse the

least sophisticated consumer"—an "objective standard" with a "relatively low bar." Pet. App. 46a.

Under this standard, the majority held, a jury could conclude that special counsel's use of state letterhead was misleading. Pet. App. 48a-54a. "The presence of the authoritative symbols at the top of the letter immediately signals to the debtor that it is the State of Ohio that is threatening to take action against her." Pet. App. 49a. And while the signature clarified that the sender was an "outside" or "special" counsel to the Attorney General, "[t]he independent debt collector may have achieved his desired impact at the point when the letter is opened and the least sophisticated consumer perceives the name of the Attorney General." Pet. App. 50a.

2. Judge Sutton dissented on both grounds. The dissent noted that special counsel "fit" the "officer" definition "to a tee." Pet. App. 57a. A law authorized counsel to collect debts for the Attorney General, and debt collection was an official duty. *Id.* At the least, "officer" was ambiguous—as Plaintiffs conceded. Pet. App. 58a. That ended the matter: "When Congress purports to regulate core state functions, it must do so unambiguously." *Id.*

On the merits, the dissent found nothing misleading about special counsel's use of state letterhead. Pet. App. 63a-70a. "[S]pecial counsel are no different from assistant attorneys general paid to recover the State's money." Pet. App. 64a. Their use of Attorney General letterhead does not falsely imply that the letters came from the Attorney General because the "letters *do* come from the Attorney General." Pet. App. 65a.

3. The Sixth Circuit denied rehearing en banc. Pet. App. 1a. Judge Clay's concurrence noted that the letterhead could mislead debtors "into believing that [they were] being contacted directly by the attorney general's office rather than debt collection attorneys," which could intimidate them "into promptly paying the debt out of fear that that the attorney general might take punitive action against them." Pet. App. 3a. And because Congress meant to regulate independent debt collectors, special counsel fell outside the exemption. *Id.*

Judge Sutton—joined by Judges Boggs, Batchelder, Cook, and McKeague—made four points in dissent. Pet. App. 7a. *First*, he said that "[h]ow these letters could be misleading is beyond me" given that counsel sent the letters for the Attorney General. Pet. App. 8a. *Second*, he noted that "special counsel face potential liability coming and going" under the panel's decision because "recipients will assume that the letter does *not* concern a state debt" if counsel use private letterhead. Pet. App. 9a. *Third*, he reiterated that the "officer" exception applies because the case "implicates foundational federalism concerns." *Id.* *Fourth*, he concluded that Plaintiffs seek to have it both ways: For purposes of the exception, they find it clear that the letters do not come from the State; for purposes of liability, they "feign confusion." Pet. App. 10a.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD REVIEW WHETHER SPECIAL COUNSEL QUALIFY AS STATE "OFFICERS" UNDER 15 U.S.C. § 1692A(6)(C)

The Court should review the scope of 15 U.S.C. § 1692a(6)(C), which excludes from the Act's debt-collector definition "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." The Sixth Circuit's view that this text does not reach special counsel for Ohio's Attorney General conflicts with this Court's cases and with an analogous circuit case.

A. The Decision Below Conflicts With This Court's Cases

Because the Act does not define "officer," all agree it incorporates the general statutory definition: that "officer" "includes any person authorized by law to perform the duties of the office." 1 U.S.C. § 1. Special counsel satisfy this definition. One law gives the Attorney General the *duty* to collect debts owed to the State, Ohio Rev. Code § 131.02; another *authorizes* special counsel "to represent the state" in this duty, *id.* § 109.08. The Sixth Circuit's contrary view conflicts with two lines of this Court's cases: (1) those requiring Congress to speak clearly before intruding on state prerogatives, and (2) those interpreting 42 U.S.C. § 1983 not to draw sharp distinctions based on a defendant's employment status.

1. The decision below conflicts with this Court's clear-statement cases

a. "Among the background principles of construction that [the Court's] cases have recognized are

those grounded in the relationship between the Federal Government and the States under our Constitution." *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014). Given our "'dual system of government,'" the Court refuses to read a federal law as "impinging upon important state interests" unless Congress speaks clearly. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (citation omitted). By "resolv[ing] ambiguity in a federal statute" in favor of the States, *Bond*, 134 S. Ct. at 2090, this rule respects their "substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere," *Gregory*, 501 U.S. at 461.

This clear-statement rule is a mainstay of the Court's cases. The Court has invoked the rule to determine the breadth of specific federal laws, ranging from criminal laws, *Bond*, 134 S. Ct. at 2089-90, to employment laws, *Gregory*, 501 U.S. at 470, to bankruptcy laws, *BFP*, 511 U.S. at 544. It has also used the rule to create subsidiary canons cutting across the U.S. Code, including the presumption against preemption, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996), the rule that federal laws must clearly abrogate a State's sovereign immunity, *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989), and the requirement that federal laws impose unambiguous conditions on a State's acceptance of federal funds, *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 16-18 (1981).

b. The Sixth Circuit's refusal to apply the clear-statement rule conflicts with these cases. It rejected the rule because "Ohio is not being regulated; nor is the structure of its government being challenged."

Pet. App. 39a. This analysis was both mistaken and irrelevant.

The analysis was mistaken for two reasons. For one thing, debt collection qualifies as a central sovereign activity. As detailed above, *supra* at 1-3, States have always viewed their debt-collection prerogatives as arising from their sovereignty. Like taxation, *Piccadilly Cafeterias*, 554 U.S. at 51, or sovereign immunity, *Mississippi*, 292 U.S. at 325, debt collection concerns the public fisc—"the life blood of the state." *Am. Bonding Co. of Baltimore v. Reynolds*, 203 F. 356, 357 (D. Mont. 1913). Unsurprisingly, then, the clear-statement rule that the majority refused to apply may have gotten its start in this *very* context. *Shelton*, 47 Conn. at 404-05 (discussing history). If the rule applies anywhere, it applies here.

For another, in *any* context, the Court starts with the "assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004). A State's prerogative to choose between special counsel and employees is just as much a sovereign choice as is a State's prerogative to choose between state and local employees. *Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 437-39 (2002). Indeed, the Attorney General has had the general authority to hire special counsel *longer* than he has had the general authority to hire employees. *Compare* 97 Ohio Laws at 60, *with* 107 Ohio Laws at 504. Because the Sixth Circuit would treat special counsel differently from employees, its view "trench[es] on

[Ohio's] arrangement[] for" carrying out its duties. *Nixon*, 541 U.S. at 140.

Regardless, the majority's analysis was irrelevant. The clear-statement rule has *never* been limited to laws "regulat[ing]" a State or "challeng[ing]" "the structure of its government." Pet. App. 39a. Many cases apply the rule to laws not regulating the States *at all*. Most recently, *Bond* relied on the rule to interpret a federal criminal law as not covering a wife's attempt "to injure her husband's lover"—a far cry from a State's structure. 134 S. Ct. at 2083.

2. The decision below conflicts with the Court's § 1983 cases

a. The Court has interpreted § 1983 as implicitly incorporating common-law immunities that government officials historically asserted. *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976). When determining the type of immunity to grant, the Court "rests on functional categories, not on the status of the defendant." *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983). That is, "immunity flows not from rank or title or 'location within the Government,' but from the nature of the responsibilities of the individual official." *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985) (citation omitted).

Given this approach, the Court has held that a lawyer may seek qualified immunity under § 1983 even though he served a local government as a private contractor, not as a public employee. *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012). *Filarsky* recognized that government operations have long been accomplished by private citizens. *Id.* at 1662-65. And "examples of individuals receiving immunity for ac-

tions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of government itself." *Id.* at 1665.

b. The Sixth Circuit's narrow reading of "officer" conflicts with *Filarsky*. As a general matter, the definition of "officer" dates to the time examined in *Filarsky*. The law that put this definition in its current home, 1 U.S.C. § 1, replaced a similar definition from 1871. Act of July 30, 1947, Pub. L. No. 80-278, § 2, 61 Stat. 633, 641; Act of Feb. 25, 1871, 41 Cong. ch. 71, § 2, 16 Stat. 431 (defining "officer" to "include any person authorized by law to perform the duties of such office"). It is unlikely that this definition excluded private contractors performing government duties given "the nature of government at the time." *Filarsky*, 132 S. Ct. at 1662. Courts recognized then that individuals appointed to temporarily undertake government duties, "for such time as in service, [were] officers of the law." *North Carolina v. Gosnell*, 74 F. 734, 738-39 (C.C.W.D.N.C. 1896).

Two historical examples that are relevant to the Act show that the Sixth Circuit's decision conflicts with *Filarsky*'s approach.

Example 1: The Act's legislative history identifies "marshals and sheriffs" as exempt officials. S. Rep. No. 95-382, at 3 (1977), 1977 U.S.C.C.A.N. 1695, 1698. But the duties of "sheriffs and constables" have long been performed by private parties. *Filarsky*, 132 S. Ct. at 1664. And it was established that private individuals who were "appointed special deputies, or officers, for the performance of a particular official duty" were "entitled to all the protection which the law affords to the regular officer." W. Murfree, *A Treatise on the Law of Sheriffs and Other*

Ministerial Officers § 83, p. 48 (1884); *Andrews v. State*, 78 Ala. 483, 485 (1885); *State v. Moore*, 39 Conn. 244, 250 (1872). Yet, under the Sixth Circuit's view, these "special" officers would nevertheless be subject to the Act. *Cf. Weiss v. Weinberger*, No. 2:04-cv-463, 2005 WL 1432190, at *4 (N.D. Ind. June 9, 2005) (holding that a court-appointed federal receiver was an "officer" under the Act).

Example 2: Since 1986, the Act has reached ordinary litigation activities of private attorneys. *See Heintz v. Jenkins*, 514 U.S. 291, 294-95 (1995). But governments have long used private attorneys for litigation. *Filarsky*, 132 S. Ct. at 1663-64. And it was established that private attorneys would be entitled to immunity when serving the government in that role. *Id.*; *White v. Polk Cnty.*, 17 Iowa 413, 414 (1864) (noting that "these necessary officers may be appointed, temporarily"). Yet, under the Sixth Circuit's view, the Congress that granted private counsel absolute immunity for alleged constitutional violations arising from litigation, *Imbler*, 424 U.S. at 427; *Cornejo v. Bell*, 592 F.3d 121, 127-28 (2d Cir. 2010), made them broadly face liability under the Act even in cases that arise from alleged "technical—but harmless—violations." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 618 (2010) (Kennedy, J., dissenting).

* * *

If anything, this case is easier than *Filarsky*. The clear-statement rule led the Court to adopt § 1983's various immunities even though the "statute on its face does not provide for *any* immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). Here, however, Congress *did* adopt a broad exception for state ac-

tors. If a statute with *no* government immunities can be read to include an implied immunity for private actors performing government duties, a statute with a *capacious* government exception should be read to extend the exception to those same parties.

Congress itself believed so. It authorized the *U.S.* Attorney General to appoint private counsel to collect debts. 31 U.S.C. § 3718. When doing so, Congress found it necessary to state *expressly* that those attorneys were debt collectors under the Act, "[n]otwithstanding the fourth sentence of section 803(6)" (the sentence in the Act containing the various exceptions). *Id.* § 3718(b)(6). No similar clear statement exists for lawyers undertaking the sovereign state function of collecting debts for *State* Attorneys General.

B. The Decision Below Conflicts With An Analogous Circuit Case

1. "[T]he only circuit to confront an analogous governmental debt-collection practice has rejected" the Sixth Circuit's view. Pet. App. 69a (Sutton, J., dissenting) (citing *Heredia v. Green*, 667 F.2d 392 (3d Cir. 1981)). In *Heredia*, Landlord and Tenant Officers of the Philadelphia Municipal Court, acting at the request of landlords, regularly sent a "Municipal Court Notice of Termination of Lease" to tenants behind on their rent. 667 F.2d at 393. The notice demanded past-due rent and threatened eviction proceedings. *Id.* Tenants brought suit against one such officer, alleging that the notice "falsely" suggested that it had been sanctioned by the court. *Id.* at 396 (Stern, J., concurring).

The Third Circuit held that the officer fell within the exception because he was appointed by the court and "perform[ed] his duties pursuant to orders and instructions from the President Judge." *Id.* at 395. A concurring judge noted that it would be "anomalous" to expose the officer to "liability for deceptively giving the impression that he was acting as an officer of the court despite the fact that his actions had indeed been authorized by that court." *Id.* at 396 (Stern, J., concurring).

Identical logic applies here. As in *Heredia*, defendants were directed to send letters by a government actor. Pet. App. 56a. And, as in *Heredia*, plaintiffs alleged that identifying the government actor on the letters falsely represented the letters' connection to that actor. Pet. App. 55a. Indeed, the Act's exception makes more sense here. The officer in *Heredia* collected debts owed to *private* landlords, 667 F.2d at 393; the special counsel here collect debts owed to the *State*, Pet. App. 55a. In *Heredia*, moreover, no law identified debt collection as one of the officer's duties, 667 F.2d at 394-95; in this case, Ohio Revised Code § 109.08 identifies debt collection as special counsel's singular duty.

Relegating *Heredia* to a footnote, the Sixth Circuit responded: "Unlike special counsel, the Landlord and Tenant Officer position was prescribed duties by statute and the holder of the position was not in an independent contractual relationship for the purpose of collecting debts." Pet. App. 38a n.10. Yet the only duties *statutorily* prescribed for the officers were those "heretofore performed by constables" under Pennsylvania's Landlord and Tenant Act. 1970 Pa. Laws 2, 2. That act did *not* grant constables a

duty to send collection letters. *Heredia*, 667 F.2d at 394. Further, nowhere did *Heredia* mention whether the officers were employees or contractors, let alone hang its holding on that state-law distinction. *Id.* at 394-96. The constables they replaced had, in fact, been independent contractors paid fees for services. *In re Act 147 of 1990*, 598 A.2d 985, 986 (Pa. 1991). And the officers collected fees under the same Constable Fee Bill. *Heredia*, 667 F.2d at 396.

At bottom, whatever § 1692a(6)(C)'s scope, under no sensible reading should it exempt an individual authorized to collect *private* debts only by a *state official's decree*, but not an individual authorized to collect *government* debts by a *state law*. *Heredia* cannot be squared with the decision below.

2. While rejecting *Heredia*, the majority relied on two far-afield circuit cases. Pet. App. 36a-37a (citing *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260 (9th Cir. 1996); *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379 (3d Cir. 2000)). In *Brannan*, a student loan was owed to a private bank. 94 F.3d at 1262. In *Pollice*, governmental entities sold claims arising out of taxes or water bills to a private entity. 225 F.3d at 385. Both thus involved debt collection for *private parties*. Here, however, all agree that the collection efforts concerned debts owed to the *State*.

II. The Court Should Review Whether The Use Of Attorney General Letterhead Was "Misleading" Under 15 U.S.C. § 1692e

The Court should also review whether special counsel's use of state letterhead is a "false, deceptive, or misleading representation or means." 15 U.S.C. § 1692e. Congress passed the Act almost four dec-

ades ago, but the Court has yet to review this principal provision. The lack of guidance has generated significant confusion in the circuits on a broadly recurring issue.

A. A Circuit Conflict Exists Over The General Liability Test Under § 1692e

A circuit split exists over the general test for analyzing whether a debt-collection method is "false, deceptive, or misleading." The "majority of the circuits" employ a "'least sophisticated debtor' or 'least sophisticated consumer' standard." *Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1061 n.2 (9th Cir. 2011); *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993); *Lesher v. Law Offices of Mitchell N. Kay, PC*, 650 F.3d 993, 997 (3d Cir. 2011); *Russell v. Absolute Collection Servs., Inc.*, 763 F.3d 385, 394-95 (4th Cir. 2014); Pet. App. 48a; *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1174-75 (11th Cir. 1985).

This test "is 'designed to protect consumers of below average sophistication or intelligence,' or those who are 'uninformed or naive,' particularly when those individuals are targeted by debt collectors." *Arrow Fin.*, 660 F.3d at 1062 (citation omitted). It is a "relatively low bar so as to cast [the Act's] protection over all consumers, even those who are 'gullible' or 'naïve.'" Pet. App. 46a. At the same time, its objective component supposedly "protects debt collectors against liability for bizarre or idiosyncratic interpretations of collection notices." *Clomon*, 988 F.2d at 1320.

On the split's other side, the Seventh Circuit "rejected the 'least sophisticated debtor' standard used by some other circuits." *Pettit v. Retrieval Masters*

Creditor Bureau, Inc., 211 F.3d 1057, 1060 (7th Cir. 2000). It did so because the least-sophisticated debtor is on "the very last rung on the sophistication ladder," one who "would likely not be able to read a collection notice with care (or at all), let alone interpret it in a reasonable fashion." *Gammon v. GC Servs. Ltd. P'ship*, 27 F.3d 1254, 1257 (7th Cir. 1994). The First and Eighth Circuits have since agreed. *Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98, 103 n.4 (1st Cir. 2014); *Peters v. Gen. Serv. Bureau, Inc.*, 277 F.3d 1051, 1055 (8th Cir. 2002).

These circuits have instead opted for an "unsophisticated consumer" test. *Gammon*, 27 F.3d at 1257. This hypothetical debtor "isn't a dimwit." *Wahl v. Midland Credit Mgmt., Inc.*, 556 F.3d 643, 645 (7th Cir. 2009). Rather, the debtor has "rudimentary knowledge about the financial world," is "capable of making basic logical deductions and inferences," and "reads collection letters carefully so as to be sure of their content." *Pettit*, 211 F.3d at 1060-61.

B. This General Conflict Manifests Itself In Procedural And Substantive Splits

Some cases have called the difference between these tests "de minimis." *Peter v. GC Servs. L.P.*, 310 F.3d 344, 348 n.1 (5th Cir. 2002); *Pollard*, 766 F.3d at 104 n.4. Both procedural rules and specific facts show that view to be mistaken.

1. Starting with procedural rules, the Seventh Circuit has said that its unsophisticated-debtor test requires a plaintiff to show that "'a *significant fraction* of the population'" would be misled. *Durkin v. Equifax Check Servs., Inc.*, 406 F.3d 410, 415 (7th

Cir. 2005) (emphasis added) (quoting *Pettit*, 211 F.3d at 1060)); *Williams v. OSI Educ. Servs., Inc.*, 505 F.3d 675, 678 (7th Cir. 2007). This requirement has led the court to strongly encourage plaintiffs to introduce consumer surveys that prove the misleading nature of the challenged letter—similar to the surveys used in trademark confusion cases. *McKinney v. Cadleway Props., Inc.*, 548 F.3d 496, 503 (7th Cir. 2008); *Sims v. GC Servs. L.P.*, 445 F.3d 959, 964 (7th Cir. 2006); *Durkin*, 406 F.3d at 419; *Taylor v. Cavalry Inv., L.L.C.*, 365 F.3d 572, 575 (7th Cir. 2004). In fact, "[s]uits under the [Act] have repeatedly come to grief" in the Seventh Circuit "because of flaws in the surveys conducted by the plaintiffs' experts." *DeKoven v. Plaza Assocs.*, 599 F.3d 578, 582 (7th Cir. 2010). Relatedly, the substantial-fraction requirement has led the Seventh Circuit to treat whether the challenged letter is misleading as a question of fact, not law. *Walker v. Nat'l Recovery, Inc.*, 200 F.3d 500, 503 (7th Cir. 1999).

The least-sophisticated-debtor circuits, by comparison, have not held that plaintiffs must show that the challenged letter would mislead a substantial fraction of the population. *Cf. Ellis v. Solomon & Solomon, P.C.*, 591 F.3d 130, 135 (2d Cir. 2010) (noting that the test is "designed to protect all consumers"). Nor have they required plaintiffs to introduce consumer surveys. *Cf. Gonzalez v. Kay*, 577 F.3d 600, 611 (5th Cir. 2009) (Jolly, J., dissenting) (criticizing survey requirement); *Johnson v. Revenue Mgmt. Corp.*, 169 F.3d 1057, 1063 (7th Cir. 1999) (Eschbach, J., concurring) ("I am also troubled by the majority's discussion of the use of survey evidence."). Instead, most of these circuits "disagree" with the Seventh and "think that whether a dunning letter is

confusing is always a matter of law" for the court. *Taylor*, 365 F.3d at 575; *Arrow Fin.*, 660 F.3d at 1061; *Russell*, 763 F.3d at 395. Far from a semantics game, these are real differences with real impacts.

2. A specific letterhead debate shows that the conflict has real consequences where, as here, the least-sophisticated-debtor courts *apply* that test to reach debtors with "'bizarre or idiosyncratic interpretation[s] of collection notices.'" *Lesher*, 650 F.3d at 1004 (Jordan, J., dissenting) (citation omitted). Beginning this debate, the Second Circuit held that a debt collector's use of law-firm letterhead did *not* misleadingly suggest that a lawyer had reviewed the debtor's account when the letter contained "a clear disclaimer explaining the limited extent" of lawyer involvement. *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360, 365 (2d Cir. 2005).

Two circuits then issued fractured decisions holding that the use of law-firm letterhead *did* misleadingly imply lawyer involvement—even though the letter's *second* page indicated that no lawyer had reviewed the debt. *Lesher*, 650 F.3d at 1003; *Gonzalez*, 577 F.3d at 606-07. Each decision led to sharp dissents asserting that the courts had transformed the test into one asking whether someone with an "idiosyncratic" understanding can seek relief. *Lesher*, 650 F.3d at 1004 (Jordan, J., dissenting); *cf. Gonzalez*, 577 F.3d at 607 (Jolly, J., dissenting) ("I can only conclude that this collection letter conforms" to the least-sophisticated-debtor test and that "the majority creates a different but amorphous standard for the Fifth Circuit, effectively creating a circuit split"). It is hard to imagine a court applying the unsophisticated-debtor test as reaching the results in *Lesher*

and *Gonzalez* given that the test presumes that the debtor "reads collection letters carefully so as to be sure of their content." *Pettit*, 211 F.3d at 1061.

This case deepens this divide because the Sixth Circuit held that letterhead could be misleading even though—as in *Greco* but not *Gonzales* or *Lesher*—the information illustrating the debt collector's connection to the letterhead was on the *first* page. While each letter accurately indicated that it was sent by outside or special counsel for the Attorney General, the Sixth Circuit said, the debt collector "may have achieved his desired impact at the point when the letter is opened and the least sophisticated consumer perceives the name of the Attorney General." Pet. App. 50a. "[A]n accurate description by special counsel of their relation to the [Attorney General's Office]," the Sixth Circuit concluded, does not "preclude[] liability under the" Act. Pet. App. 53a.

The dissent found, by contrast, that only an *idiosyncratic* reader could somehow mistake the true message the letters convey: that these are debts owed to Ohio and that a "special counsel" or "outside counsel" acting on behalf of the Attorney General is collecting the debts. Pet. App. 66a-67a (Sutton, J., dissenting). Likewise, under the Seventh Circuit's approach, an unsophisticated debtor would undoubtedly make the "logical deduction" that these letters were coming from special counsel acting for, and with the approval of, the Attorney General. *Pettit*, 211 F.3d at 1060. But those would be correct deductions, not mistaken ones.

III. The Decision Below Resolves These Important Questions In A Far-Reaching Way

The Court should grant review because the two questions are important and the decision below resolved them in a troubling manner.

A. To begin with, both questions implicate our federalist structure. The clear-statement rule does not involve a mere "policy concern." Pet. App. 38a. It involves the "constitutional balance of federal and state powers." *Gregory*, 501 U.S. at 460. It reflects that "the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people." *Printz v. United States*, 521 U.S. 898, 919-20 (1997).

This divided government "'secures to citizens the liberties that derive from the diffusion of sovereign power.'" *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (citation omitted). Each State's communities may set local priorities free from "the political processes that control a remote central power." *Id.* Accordingly, liberty (not just structure) "is always at stake when" federal courts interpret federal laws to encroach on States. *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

This case proves the point. States have adopted diverse debt-collection methods. This diversity has generated studies proving the effectiveness of a centralized approach like Ohio's. Pet. App. 55a (Sutton, J., dissenting) (citing Nat'l Ass'n of State Auditors, Comptrollers, and Treasurers, *Government Debt Collection: Survey Report and Recommendations* 1-3

(2010), available at http://goo.gl/kO7GQ9). Local communities may find that approach superior in tough economic times to more and more tax increases or budget cuts.

The Sixth Circuit's resolution of these questions, however, undercuts the opportunities for experimentation. As for the first, the majority's rigid distinction between public employees and private contractors performing official duties places a thumb on the scale for bigger and bigger government. Yet States should not be discouraged to try novel methods, including private options where appropriate, to better serve constituencies. *Cf. Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). As for the second, the majority's broad view of what counts as "misleading" condemns Ohio's choice to place debt-collection duties in its chief law-enforcement officer. The majority suggests that using the Attorney General to collect debts creates unlawful "leverage" under the Act, and that even assistant attorneys general escape liability *only* because they are exempt. Pet. App. 54a. Yet federal courts should not lightly critique a State's chosen division of its sovereign duties. "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory*, 501 U.S. at 460.

B. In addition, the Court routinely grants review to "correct[] lower courts when they wrongly subject individual officers to liability" under § 1983. *City and Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015). This case raises the same, if not greater, concerns.

Qualified immunity, for example, "ensur[es] that talented candidates are not deterred from public ser-

vice." *Filarsky*, 132 S. Ct. at 1665. That is the reason the Attorney General intervened here. Doc.4, Mem., PageID#61. Talented debt collectors, like talented law enforcement, lead to more professional enforcement and fairer procedure.

Similarly, private individuals often "work in close coordination with public employees, and face threatened legal action for the same conduct." *Filarsky*, 132 S. Ct. at 1666. Here, for example, the Collections Enforcement Section works closely with special counsel. Doc. 48-8, Contract, PageID#636-38. "Assistant attorneys general 'frequently' help special counsel draft pleadings, and sometimes sign on as co-counsel when a 'particularly sensitive or complex' case demands it." Pet. App. 64a (Sutton, J., dissenting) (citation omitted). Accordingly, the majority's narrow view of the exception—when combined with its broad view of liability—could leave "those working alongside" public employees "holding the bag." *Filarsky*, 132 S. Ct. at 1666.

The maxim that "[a]n uncertain immunity is little better than no immunity at all" also applies here. *Id.* Parties working for the government need "reasonably to anticipate when their conduct may give rise to liability" under the Act just as much as under § 1983. *Anderson v. Creighton*, 483 U.S. 635, 646 (1987).

If anything, the concerns behind the Court's healthy qualified-immunity docket have heightened urgency in light of the Sixth Circuit's broad liability holding. Under § 1983, "no compensatory damages may be awarded absent proof of actual injury." *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). Under the Act, however, plaintiffs can recover statutory

damages and attorney's fees *without* proof of actual injury. 15 U.S.C. § 1692k(a)(2). Not only that, the Act allows for a recovery even for good-faith misinterpretations of its ambiguous scope. *Jerman*, 559 U.S. at 577. The Act thus magnifies the risks for government actors and the disincentives to public service. *Cf. id.* at 612 (Kennedy, J., dissenting) (finding it problematic to authorize "class-action suits [that] transform technical legal violations into windfalls for plaintiffs or their attorneys").

C. The Sixth Circuit's exemption and liability holdings also leave special counsel in the dark on how to avoid protracted litigation. Special counsel could "face potential liability coming and going" because their use of *private* letterhead in response to the panel's decision might lead debtors to "assume that the letter does *not* concern a state debt." Pet. App. 9a (Sutton, J., dissenting). Yet, the dissent added, the "only thing misleading in this setting would be to suggest (through a law firm letterhead alone) that this *was not a state debt*." Pet. App. 68a. So the majority tells special counsel that their use of state letterhead could generate a lawsuit; the dissent tells them that switching to private letterhead could do so as well. What are special counsel to do?

The majority rejected the dissent's concern with private letterhead on the ground that the State has no "special authority that a regular creditor does not." Pet. App. 45a. Not so. If a debt has been certified to the Attorney General, a debtor's income-tax refund "may be applied in satisfaction." Ohio Rev. Code § 5747.12. That is not true of private debts. Unlike with a private creditor, moreover, statutes of limitation do not run against the State unless they

expressly say so. *Ohio Dep't. of Transp. v. Sullivan*, 38 Ohio St. 3d 137, 140 (1988); Ohio Rev. Code § 2329.07(A) (setting longer period for executing state judgments). Debts due the State also receive priority in probate. Ohio Rev. Code § 2117.25(A)(8). And the State Lottery Commission must use a debtor's lottery prize exceeding $5,000 to pay debts certified to the Attorney General. *Id.* § 3770.073(A). While the majority noted that private creditors may garnish lottery prizes, Pet. App. 45a, Ohio law gives that right only to creditors with a *final judgment* and only for prizes over *$100,000*; it also requires a new court order and places the debts in an inferior position. Ohio Rev. Code § 3770.07(D)(2)(b); Ohio Adm. Code 3770:1-8-01(B)(7). Given these differences, any debtor—from the most sophisticated to the least—would want to know that special counsel collect state debts on behalf of the Attorney General.

Even outside the state-debt context, others have expressed concerns with opaque "misleading" standards. Judge Easterbrook noted that the least-sophisticated-debtor test "either condemns *all* debt collection efforts (because some simpleton is bound to read the most fantastic things into ordinary language) or creates a system random in operation (because courts must be applying some other rule, which they have not communicated to debt collectors)." *Gammon*, 27 F.3d at 1259 (Easterbrook, J., concurring); *see also Lesher*, 650 F.3d at 1007 (Jordan, J., dissenting) (noting that the "practical effect" of the decision is that firms take "extraordinary risk in sending a collection letter [on firm letterhead], no matter how conciliatory").

D. Finally, the Sixth Circuit's holdings may not even help unsophisticated debtors (as compared to others). As noted by one judge who voted to hear this case en banc, the combination of vague liability standards with the absence of any need to prove a defendant's bad faith or a plaintiff's injury has "'enabled'" a sophisticated "'class of professional plaintiffs.'" *Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 513-14 (6th Cir. 2007) (Batchelder, J.) (citation omitted). Courts should be wary of turning the Act into a tool that "aligns the judicial system with those who would use litigation to enrich themselves at the expense of attorneys who strictly follow and adhere to professional and ethical standards." *Jerman*, 559 U.S. at 612 (Kennedy, J., dissenting).

As for the unsophisticated, Attorney General letterhead *does* identify special counsel's connection to the office and signals that debtors can call the office with concerns. The majority conceded that the letterhead has led debtors to do so. Pet. App. 48a-49a. This might have been one purpose behind the tax law that *required* the Attorney General to give the letterhead to special counsel for tax debts. Ohio Rev. Code § 109.08. That law's very next section created "problem resolution officers" to review complaints about special counsel. *Id.* § 109.082.

The Attorney General, it also bears noting, wears many hats. In addition to debt collection, the office oversees Ohio's Consumer Sales Practices Act. Ohio Rev. Code §§ 1345.05-.06. The office strives to balance consumer protection and fair collection. In that respect, whether or not special counsel are *statutorily* obligated to follow the Act, they are *contractually* obligated to follow its standards. Doc.48-8, Contract,

PageID#646. The Attorney General has "zero tolerance" for communications with debtors that show "less than complete respect for [their] rights." *Id.*, PageID#645-46. But if debtors remain in the dark about special counsel's connection to the office, they might not know to report real abuse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 15-___

In the Supreme Court of the United States

MARK J. SHERIFF, SARAH SHERIFF, WILES, BOYLE, BURKHOLDER & BRINGARDNER CO., LPA, AND MICHAEL DEWINE, ATTORNEY GENERAL OF OHIO,

Petitioners,

v.

PAMELA GILLIE AND HAZEL MEADOWS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

No. 14-3836

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAMELA GILLIE, ET AL.,

Plaintiffs-Appellants,

v.

LAW OFFICE OF ERIC A. JONES, LLC, ET AL.,

Defendants-Appellees,

OHIO ATTORNEY GENERAL,

Intervenor-Appellee.

ORDER
Filed: July 14, 2015

BEFORE: CLAY, GILMAN, and SUTTON, Circuit Judges.

The court received two petitions for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issue raised in the petitions were fully considered upon the original submission and decision on the cases. The petitions then were circulated to the full court. Less than a majority of the judges voted in favor of rehearing en banç.

Therefore, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt, Clerk

CLAY, Circuit Judge, concurring in the denial of rehearing en banc. I find that there is rarely a compelling reason to write separately in support of an order denying the rehearing of a case. This instance would be no different, but for the fact that my dissenting colleague has decided to elevate the importance of this matter far beyond its actual significance. Therefore, I offer these thoughts as a brief supplement to the prevailing view in this case, which was thoroughly set forth by the panel's majority opinion. *See Gillie v. Law Office of Eric A. Jones*, 785 F.3d 1091 (6th Cir. 2015).

The Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, prohibits "false, deceptive, or misleading" debt-collection practices. § 1692e. A particular practice that the FDCPA sought to extinguish was independent debt collectors "misrepresenting" that they were, in fact, "government official[s]." S. Rep. No. 95-382, at 8 (1977); *see also* 15 U.S.C. § 1692e(9). A debt collector need not work hard to run afoul of this prohibition—because the FDCPA is a prophylactic regulatory framework that imposes liability on any actions taken by an independent debt collector that tend to confuse the least sophisticated consumer. *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 329 (6th Cir. 2006). This comprehensive standard of protection is meant to safeguard even those consumers that are "gullible" or "naïve." *Kistner v. Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433, 438 (6th Cir. 2008). We have previously found that this broad base of protection is necessary because the least sophisticated consumer, once misled, "might feel pressured to immediately pay the

debt, even if she disputed its validity." *Barany-Snyder v. Weiner*, 539 F.3d 327, 334 (6th Cir. 2008) (internal quotation marks omitted).

By way of background, the Office of the Ohio Attorney General entered the marketplace and contracted for the services of private attorneys to collect consumer debts that were owed to State-owned entities, *e.g.*, the University of Akron. These private attorneys, acting as independent debt collectors, were paid exclusively from funds that they collected. These private attorneys, acting on behalf of the attorney general, have not been imbued with any powers that grant them access to unique debt-collection remedies that are otherwise unavailable to debt collectors working on behalf of private creditors, and that would justify automatically prioritizing the State's consumer debts that they were collecting above any other obligations that a debtor may have. Nonetheless, the Ohio Attorney General directed these private attorneys to use his letterhead (which is contrary to Ohio statutory law), in what seemingly was an attempt to intimidate debtors into promptly paying the debt out of fear that the attorney general might take punitive action against them. It is not difficult to fathom how the use of this letterhead could mislead the least sophisticated consumer into believing that he or she was being contacted directly by the attorney general's office rather than debt collection attorneys; and it is not difficult to understand why Congress sought to prevent independent debt collectors from misrepresenting their authority in this way.

My dissenting colleague ponders how this can be problematical when the private attorneys and the at-

torney general are in a principal-agent relationship. The answer is simple. Congress chose to regulate independent debt collectors, generally, irrespective of the clients that they have contracted with. This truth is unsurprising. Typically, a contractor is not exempted from otherwise applicable federal regulation simply because a state has entered the marketplace and chosen to purchase the contractor's services. Although the FDCPA does contain an express exemption for an "officer" or "employee" of a state so long as the collecting of debts falls within the scope of his or her official job duties, *see* 15 U.S.C. § 1692a(6)(C), the private attorneys acting as independent contractors in this case unmistakably fail to qualify for this exemption. *See Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1263 (9th Cir. 1996) ("This exemption applies only to an individual government official or employee who collects debts as part of his government employment responsibilities. [The contractor] is a private nonprofit organization with a government contract "); *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 406 (3d Cir. 2000) ("The exemption expressly is limited to 'any officer or employee of the United States or any State' [And, it] does not extend to those who are merely in a contractual relationship with the government."); *see also Piper v. Portnoff Law Assocs.*, 274 F Supp. 2d 681, 688 (E.D. Pa. 2003) ("Because the defendants are in a contractual relationship with the City , the municipal officers' exemption does not extend to them."); *Gradisher v. Check Enforcement Unit, Inc.*, 133 F Supp. 2d 988, 992 (W.D. Mich. 2001) ("This Court agrees with *Brannan* and *Pollice* that an independent contractor is not entitled to an exemption to the FDCPA pursuant to 15 U.S.C. § 1692a(6)(C).");

Knight v. Schulman, 102 F. Supp. 2d 867, 876 (S.D. Ohio 1999) ("Since the Defendant was an attorney in private practice, rather than an officer or employee of the United States, he is not excluded from the definition of debt collector, regardless of whether the Defendant was acting as an agent of the United States at the time the letters were written.").

Representing that the government is directly attempting to collect the debt might mislead a naïve consumer into believing that the debt at issue must be prioritized above all other outstanding obligations, even when that is not actually the case. That deception, in turn, could cause debtors to make hasty debt-prioritization decisions and ultimately bring about the adverse effects Congress explicitly sought to eradicate when it enacted the FDCPA. *See* 15 U.S.C. § 1692 ("Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs ").

My dissenting colleague contends that the debt collection notices in this case could only be potentially misleading if the private attorneys failed to indicate that they were working on behalf of the attorney general. That proposition is plainly wrong. The State client is only relevant inasmuch as the debt collection notice informs the debtor which debt the collector is actually seeking to collect. For example, presumably it was useful for Plaintiff Meadows to know that the letter was in reference to an outstanding balance for student loans with the University of Akron. It was also necessary for her to know the name and contact information of the private debt collection attorney who was seeking to collect the debt so that she could dispute or resolve that claim. On

the other hand, it was not pertinent or in any way helpful for her to know that the University of Akron had certified the debt to the Ohio Attorney General. That action had zero impact on her obligation to pay the debt. And that certification did not impact the private attorneys' ability to collect the debt. The mechanisms available to the private attorneys for obtaining payment were the same mechanisms that would have been at their disposal had the attorneys been collecting a debt on behalf of a private university or college.

Invoking the attorney general's name through the use of his letterhead could impermissibly mislead the least sophisticated consumer into believing that the letter came from the attorney general. For that reason, the Fifth Circuit has found that an independent debt collector working as an agent for the government violates the FDCPA simply by listing the government's return address on a debt collection envelope. See *Peter v. GC Servs. L.P.*, 310 F.3d 344, 352 (5th Cir. 2002). Deceiving the debtor into believing that the government entity is actually collecting the debt might unreasonably intimidate the debtor. Again, my dissenting colleague refuses to see the problem with this scenario because the government itself could have achieved this same intimidating impact. But that truth is entirely irrelevant. The FDCPA regulates independent debt collectors and their practices, not the states' officers and employees. It appears that my colleagues' true concern in this case is with the FDCPA itself and its failure to exempt from its provisions everyone who can be said to be operating in a principal-agent relationship with the government.

It is patently apparent that § 1692e(9) prohibits debt collectors from "falsely represent[ing]" that a communication is being "issued" by a government agent and from distributing a communication that "creates a false impression as to its source." The letters in question certainly could have led a naïve or gullible consumer into believing that they were sent directly by the Office of the Attorney General. It is also possible that the private attorneys could make it sufficiently clear in the signature block of their respective letters that they were neither government employees nor officers of the State. But it is not our job as judges on the federal Court of Appeals to presume what is or may not be confusing in every situation for the least sophisticated consumer. What Judge Sutton himself recently acknowledged in the *Buchanan* case, but now fails to recognize, is that "whether a letter is misleading raises a question of fact" for the jury. *Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 397 (6th Cir. 2015). For that very simple reason, there was nothing out of the ordinary or incorrect about the panel's decision to remand this case to the district court for resolution by the appropriate finder of fact.

SUTTON, Circuit Judge, dissenting from the denial of rehearing en banc joined by BOGGS, J., BATCHELDER, J., COOK, J., and MCKEAGUE, J.. Far be it from me to complain about my colleagues' unwillingness to hear a case en banc. As every federal judge learns before long, you can't always get what you want. And the en banc process, Fed. R. App. P 35(a), is not designed to eliminate that fixture of life on a collegial court. But there is something about this case that is difficult to let go.

The Fair Debt Collection Practices Act prohibits "false, deceptive, or misleading" debt-collection practices. 15 U.S.C. § 1692e. And it exempts State and federal "officer[s]" from its coverage "to the extent that collecting or attempting to collect any debt is in the performance of [their] official duties." 15 U.S.C. § 1692a(6)(C). At stake in this class action is the application of the Act to private law firms (known as "special counsel" in Ohio) hired by the State of Ohio's top legal official (the Ohio Attorney General) to collect debts on the State's behalf. A cognizable claim arises under the Act, our court holds, if a special counsel uses the Ohio Attorney General's letterhead in debt-collection letters sent to individual Ohio debtors. *See* Appendix (reprinting the two letters at issue in this case). What makes the two letters "misleading," says our court, is that debtors might get the impression "that a collection notice is being sent by a government actor." *Gillie v. Law Office of Eric A. Jones*, 785 F.3d 1091, 1105, 1109 (6th Cir. 2015). There are at least four problems with this theory that deserve correction by the full court.

First, there is nothing misleading about these letters. Special counsel act as the Attorney General's agents when they send out debt-collection letters on the State's behalf, and the letterhead accurately reflects that principal-agent relationship. The letterhead explains who the principal is: the Ohio Attorney General. And the signature line explains who the agent is: the private lawyer hired to collect the state debt. Making matters more perplexing, special counsel have no say in the matter: The Ohio Attorney General has directed all special counsel to use his letterhead when sending out debt-collection letters. How these letters could be misleading is beyond me.

Second, if letters on stationery that accurately reflect the principal-agent relationship are misleading under the Act, what are special counsel (or for that matter the Ohio Attorney General or for that matter other State Attorneys General) to do? If it is misleading to use the Ohio Attorney General's letterhead, isn't it also misleading to use private law firm letterhead on the same letters? For the use of private letterhead contains a potential risk of its own, indeed a greater risk: that recipients will assume that the letter does *not* concern a state debt. Under our court's decision, it seems to me, special counsel face potential liability coming and going. They may be held to account if they use state letterhead *and* if they don't. And that is so even when the Ohio Attorney General mandates—as a matter of state law—that they use his letterhead.

Third, as this discussion ought to suggest, the "officer" exemption to the Act applies, precluding federal courts from telling States what kinds of stationery to use on their debt-collection letters. All agree that, if the Ohio Attorney General had signed each of these letters, the "officer" exemption would apply. The same conclusion ought to apply, it seems to me, when the Attorney General's employees or special counsel sign the letters and accurately describe their relationship with the Attorney General—as occurred here.

Even if one thinks that the meaning of "officer" is unclear in this setting, the issue implicates foundational federalism concerns: how and when States collect and pay their debts. This core sovereign function is not the kind of thing that Congress typically regulates, and for that reason any ambiguity in the term

must be construed to protect (not infringe) state authority in the area. *See Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991). "Congress," the Supreme Court has explained, "should make its intention clear and manifest if it intends to pre-empt the historic powers of the States." *Id.* at 460 (quotation omitted). There is no doubt that Ohio's enforcement of its civil code—by collecting money owed to it—constitutes a core sovereign function. *See Diamond v. Charles*, 476 U.S. 54, 65 (1986); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856); *cf. Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 440–41 (1793) (Iredell, J.). As a result, if we can plausibly interpret the word "officer" in two ways—one of which interferes with States' debt-collection practices and one of which does not—we must choose the latter. Because the plaintiffs in this case *conceded* that the word "officer" is ambiguous, *see* Reply Br. 5, they have done our work for us. Under *Gregory*, we must hold that special counsel are "officers" who are exempt from the Act's coverage.

Fourth, plaintiffs' theory of the case—theory as to why the debt-collection letters are misleading—highlights why the *Gregory* clear-statement rule applies. Recall what the plaintiffs claim is misleading about these letters—that the state-mandated letterhead suggests that the letters come from the Ohio Attorney General: an admitted "officer" of the State. The plaintiffs feign confusion about whether the letters came from the Attorney General—yet, when it comes time to interpret the word "officer," the plaintiffs find it quite evident that the letters did *not* come from the State.

For these reasons and those mentioned in my dissent from the panel decision, 785 F.3d at 1110, I respectfully dissent from the denial of rehearing en banc.

APPENDIX

[BOTH TEXT AND IMAGES OF LETTERS REPRODUCED HERE]

[Attorney General Mike DeWine letterhead]

EXHIBIT A1
May 24, 2012

Pamela Gillie 181355
2392 ROSECREST ST.
Grove City, OH 43123-8464

Reference: 8460030
Balance: $2227.46

Dear Sir/Madam,

You have chosen to ignore repeated attempts to resolving the referenced 8460030 medical claim. If you cannot make immediate full payment call DENISE HALL at Eric A. Jones, L.L.C., 614-545-9997 at my office to make arrangements to pay this debt.

THIS IS A COMMUNICATION FROM A DEBT COLLECTOR. THIS IS AN ATTEMPT TO COLLECT A DEBT. ALL INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

Sincerely,

/s/ Eric A. Jones

Eric A. Jones
Outside Counsel for the
Attorney General's Office
Telephone: 614-545-9998
Fax: 614-224-9300

RETURN THIS PORTION WITH YOUR PAYMENT

SEND PAYMENT TO:

Law Office of Eric A. Jones, L.L.C.
580 South High Street, Suite 100
Columbus, OH 43215

If paying by credit card, check box and please fill out below

[VISA] [MASTERCARD]

Card Number _____

V-Code__ (3 digit code on back of card) Exp. Date___

Amt. Paid_____

Print Name_____

Signature_____

MED3-1

Mike DeWine
Ohio Attorney General

EXHIBIT A1

May 24, 2012

Pamela Gillo 181353
2392 ROSECREST ST
Grove City, OH 43123-8464

Reference: 8460030
Balance: $2227.46

Dear Sir/Madam,

You have chosen to ignore repeated attempts to resolving the referenced 8460030 medical claim. If you cannot make immediate full payment call DENISE HALL at Eric A. Jones, L.L.C., 614-545-9997 at my office to make arrangements to pay this debt.

THIS IS A COMMUNICATION FROM A DEBT COLLECTOR. THIS IS AN ATTEMPT TO COLLECT A DEBT. ALL INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

Sincerely,

Eric A. Jones
Outside Counsel for the
Attorney General's Office
Telephone: 614-545-9998
Fax: 614-224-9300

RETURN THIS PORTION WITH YOUR PAYMENT

SEND PAYMENT TO:

Law Office of Eric A. Jones, L.L.C.
380 South High Street, Suite 100
Columbus, OH 43215

IF PAYING BY CREDIT CARD, CHECK BOX AND PLEASE FILL OUT BELOW

☐ VISA ☐ [redacted]

Card Number _____

V-Code _____ Exp. Date _____

Amt. Paid _____

Print Name _____

Signature _____

MED3-1

[Office of the Ohio Attorney General
Collections Enforcement Section letterhead]

EXHIBIT B1

July 20, 2012

HAZEL MEADOWS
587 SOUTH HARRIS AVENUE
COLUMBUS OH 43204

Re: STATE OF OHIO – UNIVERSITY OF AKRON
v. HAZEL MEADOWS
Amount of Claim: $2,581.07
*Our File No. 37430.001

Sir/Madam:

Per your request, this is a letter with the current balance owed for your University of Akron loan that has been placed with the Ohio Attorney General. Feel free to contact me at 614-221-2073 should you have any further questions.

Very truly yours,

/s/ Sarah Sheriff

Wiles, Boyle, Burkholder & Bringardner Co., LPA
300 Spruce Street
Columbus, Ohio 43215
Special County to the Attorney General for the State of Ohio

NOTICE – This is an attempt to collect a debt. Any information that we obtain will be used for that purpose. We will assume this debt to be valid unless you dispute the validity of all or any part of it within 30 days of receipt of this letter. If you notify us in writing you dispute all or part of the debt, we will obtain and send to you verification of the debt or a copy of

the judgment against you. Upon written request within 30 days after receipt of this notice, we will provide you with the name and address of the original creditor, if different from the creditor named above. We are debt collectors.

***IMPORTANT – PLEASE REFER TO OUR FILE NO. IN ALL COMMUNICATION**

EXHIBIT B1

Office of the Ohio Attorney General
Collections Enforcement Section

July 20, 2012

HAZEL MEADOWS
587 SOUTH HARRIS AVENUE
COLUMBUS OH 43204

RE: STATE OF OHIO - UNIVERSITY OF AKRON
v. HAZEL MEADOWS
Amount of Claim: $2,581.07
*Our File No: 37430.001

Sir/Madam:

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Very truly yours,

Sarah Sheriff

Sarah Sheriff
Wiles, Boyle, Burkholder & Bringardner Co., LPA
300 Spruce Street
Columbus, Ohio 43215
Special Counsel to the Attorney General for the State of Ohio

NOTICE - This is an attempt to collect a debt. Any information that we obtain will be used for that purpose. We will assume this debt to be valid unless you dispute the validity of all or any part of it within 30 days of receipt of this letter. If you notify us in writing that you dispute all or part of the debt, we will obtain and send to you verification of the debt or a copy of the judgment against you. Upon written request within 30 days after receipt of this notice, we will provide you with the name and address of the original creditor, if different from the creditor named above. We are debt collectors.

* IMPORTANT - PLEASE REFER TO OUR FILE NO. IN ALL COMMUNICATION

APPENDIX B

Recommended for full Text-Publication
Pursuant to Sixth Circuit I.O.P 32.1(b)
File Name: 15a0087p.06

No. 14-3836

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAMELA GILLIE; HAZEL MEADOWS,

Plaintiffs-Appellants,

v.

LAW OFFICE OF ERIC A. JONES, LLC; ERIC A. JONES; WILES, BOYLE, BURKHOLDER & BRINGARDNER CO., LPA; MARK JEFFREY SHERIFF; SARAH SHERIFF,

Defendants-Appellees,

OHIO ATTORNEY GENERAL,

Intervenor-Appellee.

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 2:13-cv-00212—James L. Graham, District Judge

Argued: March 3, 2015

Decided and Filed: May 8, 2015

Before: CLAY, GILMAN, and SUTTON, Circuit Judges.

COUNSEL

ARGUED: James E. Mobile, NOBILE & THOMPSON CO., L.P.A., Hilliard, Ohio, for Appellants. Christopher P Conomy, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Intervenor-Appellee. Boyd W Gentry, LAW OFFICE OF BOYD W GENTRY, LLC, Beavercreek, Ohio, for Jones Appellees. Michael L. Close, ISAAC WILES BURKHOLDER & TEETOR, Columbus, Ohio, for Appellees Wiles and Sheriff. **ON BRIEF**: James E. Nobile, Eric E. Willison, NOBILE & THOMPSON CO., LPA, Hilliard, Ohio, for Appellants. Christopher P Conomy, Sherry M. Phillips, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Intervenor-Appellee. Boyd W Gentry, LAW OFFICE OF BOYD W GENTRY, LLC, Beavercreek, Ohio, for Jones Appellees. Michael L. Close, Dale D. Cook, ISAAC WILES BURKHOLDER & TEETOR, Columbus, Ohio, for Appellees Wiles and Sheriff.

CLAY, J., delivered the opinion of the court in which GILMAN, J., joined. SUTTON, J. (pp. 25-37), delivered a separate dissenting opinion.

OPINION

CLAY, Circuit Judge. Plaintiffs Pamela Gillie and Hazel Meadows appeal the district court order entering summary judgment in favor of Defendants Eric A. Jones; the Law Office of Eric A. Jones, LLC ("Jones Law Office"); Mark J. Sheriff; Sarah Sheriff; and Wiles, Boyle, Burkholder & Bringardner Co., LPA ("Wiles Law Firm"). Plaintiffs brought this action under the Fair Debt Collection Practices Act

("FDCPA"), 15 U.S.C. § 1692 *et seq.*, alleging that Defendants utilized a deceptive, misleading, or false representation or means in attempting to collect consumer debts Plaintiffs owed to entities owned and operated by the State of Ohio. The Attorney General intervened on behalf of Defendants, asserting that the alleged misrepresentation—consisting of sending debt-collection notices on the Attorney General's letterhead—was not a misrepresentation at all and was, in fact, authorized by the Attorney General. The district court found that Defendants were exempt from FDCPA coverage as "officers" of the State of Ohio; and that, in any event, their use of the Attorney General's letterhead did not violate the FDCPA.

For the reasons set forth below, we **VACATE** the summary judgment in favor of Defendants and **REMAND** this case to the district court for further proceedings consistent with this opinion.

BACKGROUND

On September 20, 1977, Congress enacted the Fair Debt Collection Practices Act, Pub. L. 95-109, 91 Stat. 874 (codified at 15 U.S.C. 1692 *et seq.*), as Title VIII of the Consumer Credit Protection Act. Abusive debt collection practices were at the time, and remain today,[1] a "serious national problem" that

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1 *See* Press Release, FTC, New York Attorney General Crack Down on Abusive Debt Collectors (Feb. 26, 2015), available at https://www.ftc.gov/news-events/press-releases/2015/02/ftc-new-york-attorney-general-crackdown-abusive-debt-collectors; Rebecca Thiess & Ellen Taverna, *Cleaning Up Debt Collection: New rules are necessary to end abusive debt collection practices*, U.S. News (Mar. 24, 2014, 10:45 a.m. EDT), http://www.usnews.com/opinion/economic-

"touches the lives of many Americans." S. Rep. No. 95-382, at 2 (1977).[2] The FDCPA specifically sought to target all "third party" and "independent debt collectors," whom the Senate cited as "the prime source of egregious collection practices." *Id.* The Senate's contention was that independent debt collectors have little incentive to act fairly, given that they "are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them." *Id.* at 2. Moreover, the independent collector's commissions-based incentive to collect as many debts as possible is problematic, because it increases the likelihood of abusive collection practices. *Id.* The same concerns, however, are not present for "in house collectors," who were to be excluded from the FDCPA's broad definition of the term "debt collector." *Id.* at 3 (internal quotation marks omitted). "Government officials, such as marshals and sheriffs," were offered by the Senate as the lone example of "in house" collectors working in the public sector. *Id.* at 3. The statutory language ultimately adopted for this exemption excluded from the definition of debt collector, "any officer or employee of any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." 15 U.S.C. § 1692a(6)(C). This language remains the only exemption for state actors. The term "debt collector," from which these state actors are exempted, was ultimately defined as "any person who regularly collects or attempts to collect, directly or indirectly,

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intelligence/2014/03/24/the-consumer-protection-bureau-should-endabusive-debt-collection.

[2] This is the final committee report that was presented with the legislation before its enactment.

debts owed or due or asserted to be owed or due another." § 1692a(6). The overwhelming breadth of this provision is fitting, given Congress's intent to extinguish all abusive debt collection practices. One of these practices consisted of independent debt collectors "misrepresenting" that they were, in fact, "government official[s]." S. Rep. No. 95-382, at 8 (1977). This concern, along with the issue of who would qualify for the state sector exemption, are among the issues we address in this opinion.

Special Counsel and the Ohio Attorney General

Title I, Chapter 131, of the Ohio Revised Code governs the collection of debts[3] owed to the State of Ohio. These debts include unpaid taxes, overdue fees on governmental services, and administrative fines, as well as consumer debts arising from transactions with various State-owned entities (*e.g.*, overdue tuition from a State university or unpaid medical bills from a State hospital). This case is about consumer debts. Debts that remain uncollected by the State entity to whom the debt is owed are eventually "certified" to the Office of the Ohio Attorney General ("OAG"). Ohio Rev. Code § 131.02(A). The Attorney General is thereafter responsible for collecting the debt or disposing of it by other means (*e.g.*, securing a judgment, selling or transferring the claim on the debt, or causing the debt to be canceled). §§ 131.02(C), (F).

The Attorney General is not personally required to collect the debts certified to the OAG. Section 109.08

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[3] These debts are generally referred to as "claims" throughout the Ohio Revised Code.

of the Ohio Revised Code provides that the Attorney General may enlist "special counsel" to collect debts on the Attorney General's behalf. The statute reads in full:

> The attorney general may appoint special counsel to represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect.
>
> Such special counsel shall be paid for their services from funds collected by them in an amount approved by the attorney general.
>
> The attorney general shall provide to the special counsel appointed to represent the state in connection with claims arising out of [specific tax debts] the official letterhead stationery of the attorney general. The special counsel shall use the letterhead stationery, but only in connection with the collection of such claims arising out of those taxes.

Ohio Rev. Code § 109.08

Special counsel receive their appointment by submitting a successful response to a Request for Qualifications. Once selected, they enter into a "retention agreement" with the Attorney General that defines the scope of their engagement.

The retention agreement contains a few provisions that are germane to this dispute. First, actions taken by special counsel are only authorized by and through the retention agreement and only for its duration. (R. 48-8, 2013 Retention Agreement, PageID # 634 ("No services rendered by Special Counsel after

the date of Termination shall be authorized or payable without an additional agreement from the Attorney General."). Second, "Special Counsel shall be engaged by the Attorney General solely on an independent contractor basis." (*Id.* at PageID # 635 ("No Special Counsel shall be regarded as in the employment, or as an employee of, the Attorney General or the State Clients."). Third, "the appointment of Special Counsel is personal in nature and does not extend to any law firm that the Special Counsel is associated with." (*Id.* at PageID # 634). Fourth, claims are assigned to special counsel; however, all collections must be forwarded and endorsed by the Attorney General before the special counsel is entitled to receive a percentage of the collections-based fee. Fifth, the retention agreement requires special counsel to "comply with the same standards of behavior as set forth in the Fair Debt Collection Practices Act." (*Id.* at PageID # 646). In addition to these provisions, though not in the agreement, special counsel have been orally directed by the Attorney General to utilize OAG letterhead in connection with all collections (including consumer debts, even though it is contrary to Ohio's code[4]).

On April 13, 2012, the OAG announced a "Request for Qualifications for Special Counsel of Fiscal Year 2013" ("RFQ"). (R. 48-11, Jones Response to RFQ, PageID # 658). The RFQ solicited responses from qualified attorneys who wished to enter into a contract to perform debt collection on behalf of the state.

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[4] "The special counsel shall use the letterhead stationery, *but only in connection with* the collection of such claims arising out of those *taxes*." Ohio Rev. code § 109.08 (emphasis added).

The relationship would be "defined by contract" and the "appointment" would "only become effective upon execution of [the] Retention Agreement." (*Id.* at PageID # 661, 663).

Defendant Mark J. Sheriff submitted a response to the RFQ on May 1, 2012. Sheriff, a partner at Wiles Law Firm, had previously been appointed as a special counsel. Sarah Sheriff also worked for Defendant Wiles Law Firm at the time under the direction of Mark Sheriff. Defendant Eric A. Jones submitted a response to the RFQ on May 2, 2012. Jones, who owned and operated Defendant Jones Law Office, had likewise served as a special counsel in previous years. Sheriff and Jones became special counsel to the Attorney General for fiscal year 2013 upon the execution of the retention agreements they received, following their selection based on their respective responses to the RFQ.

On May 24, 2012, Plaintiff Pamela Gillie was engage in bankruptcy proceedings when she received a debt collection letter from Jones. The collection letter was written on OAG letterhead, which included both an image of the Great Seal of the State of Ohio and the Attorney General's name—Mike DeWine—in large font at the top of the page. The letter stated: "Dear Sir/Madam, You have chosen to ignore repeated attempts to resolving the referenced medical claim. If you cannot make immediate full payment call DENISE HALL at Eric A. Jones, L.L.C. at my office to make arrangements to pay this debt." (R. 48-2, Jones Collection Ltr., PageID # 611). The next paragraph of the letter continued in bold capital font, "THIS IS A COMMUNICATION FROM A DEBT COLLECTOR." (*Id.*) The signature block

read "Eric A. Jones Outside Counsel for the Attorney General's Office," and the return payment stub provided that payments should be made to the Law Office of Eric A. Jones, L.L.C. (*Id.* at PageID # 611 12). The notice did not specifically identify the original creditor or the date on which the debt was incurred. Gillie thought that it might have been related to her pregnancy. She believed that the letter was from the Attorney General but the inclusion of the other names confused her.

On July 20, 2012, Plaintiff Hazel Meadows received a debt collection letter from Sarah Sheriff with Wiles Law Firm. The letter used Office of the Attorney General letterhead for the "Collections Enforcement Section" and likewise included an image of Ohio's Great Seal. (R. 48-4, Wiles Collection Ltr., PageID # 614). The body of the letter read, "Sir/Madam: Per your request, this is a letter with the current balance owed for your University of Akron loan that has been placed with the Ohio Attorney General. Feel free to contact me should you have any further questions." (*Id.*) It was signed by Sarah Sheriff and the signature block noted her association with Wiles Law Firm and indicated that she was "Special Counsel to the Attorney General." (*Id.*) It was also noted in the letter that the sender was a debt collector. Meadows was confused by the letter and did not recall "ever asking anyone for information" about her debts. (R. 48-3, Meadows Affidavit, PageID # 612). Sarah Sheriff averred, however, that the letter was drafted in response to a phone call and that Meadows could not have been confused because she had previously made payment on the same debt after entering into an agreed judgment and payment plan on March 6, 2008.

Plaintiffs filed this suit on March 5, 2013, alleging that Defendants violated various provisions of the FDCPA by utilizing the OAG letterhead. The Attorney General thereafter successfully moved to intervene as Defendant and Counterclaimant. On September 6, 2013, the district court stayed discovery and ordered briefing to determine whether the issues of liability and damages should be bifurcated. Bifurcation was ordered on December 4, 2013, to delay a costly class-certification process until the court could decide the two legal issues presented: whether "special counsel" are debt collectors under the FDCPA and whether the use of letterhead from the Office of the Attorney General by special counsel violates the FDCPA. The district court also continued the stay of discovery and ordered the filing of dispositive motions within sixty days.

Plaintiffs and Defendants filed opposing motions for summary judgment and made appropriate responses. The Attorney General also moved for a judgment on the pleadings, and Plaintiffs moved to dismiss the Attorney General's counter-complaint for failure to state a claim. The district court granted Defendants' motions for summary judgment, denied the Attorney General's motion for judgment on the pleadings, denied Plaintiffs' motion for summary judgment, and denied as moot Plaintiffs' motion to dismiss for failure to state a claim. The court first held that special counsel are not "debt collectors" within the meaning of the FDCPA because they are officers of the State of Ohio, and state officers are explicitly exempted from FDCPA coverage. The court then went on to determine that, even if special counsel did fall within the definition of a "debt collector," use of OAG letterhead was not a "false, deceptive or

misleading" communication in violation of 15 U.S.C. § 1692e. This appeal followed.

DISCUSSION

Standard of Review

We review *de novo* an appeal from an order granting summary judgment. *Combs v. Int'l Ins. Co.*, 354 F.3d 568, 576 (6th Cir. 2004). Summary judgment should be granted when there exists no genuine dispute of material fact and, in light of the facts presented, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P 56. The court may look to "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" when ruling on the motion. *Id.* The facts must be viewed in the light most favorable to the non-moving party and all reasonable inferences shall be afforded to those facts. *Combs*, 354 F.3d at 576-77 But, a mere "scintilla of evidence" that militates against the clear weight of the evidence in the record does not create a genuine issue of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

Analysis

I. "Debt Collectors" and the "Officer or Employee" Exemption

The FDCPA was enacted to prevent "abusive debt collection practices" and ensure that those debt collectors who fairly engage in the practice of debt collecting "are not competitively disadvantaged" by their peers' malfeasance. 15 U.S.C. § 1692. A "debt collector" is "any person who regularly collects or attempts to collect debts owed or due another" for profit. § 1692a(6). Any individual qualifying as an "officer or employee" of a state is excluded from

this definition if attempting to collect debts "in the performance of his official duties." § 1692a(6)(C).

The issue before us is controlled by the scope of the term "officer." Specifically, we must determine whether private attorneys "appointed" as "special counsel" to the Ohio Attorney General, but operating as independent contractors, are officers of a state, within the meaning of the FDCPA. We think not. The use of the word "appoint" in reference to "hiring" independent contractors is not decisive. Special counsel, in truth, are indistinguishable from the myriad of independent contractors who enter into for-profit agreements with government agencies or actors to help fulfill the duties of some government office. The FDCPA is a broad remedial statute, *Frey v. Gangwish*, 970 F.2d 1516, 1520 (1992), with limited, clearly defined exceptions. We find no justification for diluting its protection by broadly interpreting the term "officer or employee" to include independent contractors.

A. The Dictionary Act

When a statutory term is left undefined by Congress, we first turn to the Dictionary Act, which offers definitions for words that are commonly used throughout Acts of Congress. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014). "Officer" is one of those words; and we must adhere to the Dictionary Act definition, "unless the context indicates otherwise." 1 U.S.C. § 1. Both sides insist that our judgment should be guided by extra-statutory considerations: Plaintiffs posit that we infer legislative intent as to the scope of the exclusion

by looking to principles of sovereign immunity;[5] whereas the Attorney General stresses the importance of federalism and a state's ability to determine the organization of its own government. "[T]he qualification 'unless the context indicates otherwise' has a real job to do, in excusing the court from forcing a square peg into a round hole." *Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 200 (1993). But we have not been stuck with a square peg. The Dictionary Act provides a specific definition for the present occasion that comports with our common understanding of the word "officer," and leads to a result that is consistent with the purpose of the FDCPA.

We review *de novo* the interpretation of statutory language. *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC*, 754 F.3d 380, 384 (6th Cir. 2014). When the language of a statute is clear we must apply its plain meaning. *Ashland Hosp. Corp. v. Serv. Emps. Int'l Union, Dist. 1999*, 708 F.3d 737, 723 (6th Cir. 2013).

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[5] Debt collection companies that win government contracts pursuant to a statutory authorization are not entitled to sovereign immunity. *Rosario v. Am. Corrective Counseling Servs.*, 506 F.3d 1039 (11th Cir. 2007); *Del Campo v. Kennedy*, 517 F.3d 1070 (9th Cir. 2008). Special counsel, likewise, are not entitled to sovereign immunity because of their independent-contractor status and indemnification of the OAG. *See Brotherton v. Cleveland*, 173 F.3d 552, 560 (6th Cir. 1999) (listing four factors for the court to consider; indemnification being the most salient); *cf. Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 51 n.21 ("It would indeed heighten a mystery of legal evolution were we to spread an Eleventh Amendment cover over an agency that consumes no state revenues but contributes to the State's wealth." (internal quotation marks omitted)).

An "officer" "includes any person authorized by law to perform the duties of the office." 1 U.S.C. § 1. Defendants contend that "special counsel" easily fall within this definition by operation of the following Ohio statutes: § 109.08, authorizing the Attorney General to appoint special counsel to collect debts; and § 131.02, assigning the Attorney General responsibility over the collection of debts owed to the State. The difficulty with Defendants' arguments is that these statutes do not authorize special counsel to fulfill the duties of any office. Our focus is drawn to the following words: "authorized by law" and "the duties of the office." We consider each phrase in turn.

1. Authorized by Law

Although it is true that special counsel are authorized to collect certain debts assigned to them on behalf of the Attorney General, they are not authorized to do so by law. The Attorney General contends that § 109.08—bearing the title "special counsel to collect debts"—provides such an authorization. But this argument is specious. Our analysis must be guided by parsing the meat and bones of the statute, not simply by surveying its skin. Section 109.08, which is broken into four sentences, primarily governs the conduct of the Attorney General, and not that of special counsel. First, the statute authorizes the Attorney General to employ *or* contract with individuals selected by the Attorney General to act as special counsel for the purpose of collecting debts certified to the OAG. Second, it authorizes the Attorney General to set the pay of special counsel, which must be allocated only from funds that special counsel themselves have collected. Third, § 109.08 requires the Attorney

General to provide OAG letterhead to any special counsel assigned to collect specific tax debts. The fourth sentence, "The special counsel shall use the letterhead stationery, *but only in connection with* the collection of such claims arising out of those *taxes*," is the only provision of the statute that grants any authority to special counsel. Ohio Rev. Code § 109.08 (emphasis added). This provision not only fails to authorize any collections activity, it restricts the manner in which collections may occur should any collections actually be authorized or assigned by the Attorney General.[6] Section 109.08 simply establishes the framework under which the Attorney General, within his or her discretion, may delegate the collection of debts to a third-party debt collector. Authorization to actually act as an officer of a state requires more. Such an authorization entails the actual capability to act, not merely the prospect of a future delegation. *See Authorize* and *Authority*, BLACK'S LAW DICTIONARY (10th Ed. 2014) [hereinafter "BLACK'S"] (to authorize is "to give legal authority," which means "the power delegated by a principal to an agent").

We find no difficulty in determining the source of special counsel's authority. The RFQ emphasized that an appointment as special counsel would "only

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[6] The Attorney General's insistence that special counsel violate this restriction is the basis for this action. Taxes owed to a state are not debts under the FDCPA. The legislature's failure to specifically endorse the use of OAG letterhead by special counsel in the collection of consumer debts supports an inference that the state understood special counsel to be independent debt collectors and not entitled to use government letterhead.

become effective upon execution of a Retention Agreement," and that any relationship with the OAG would exclusively be "defined by contract." (R. 48-11, Jones Response to RFQ, PageID # 661, 663). The retention agreements themselves reiterated that "[s]pecial counsel shall be engaged by the Attorney General solely on an independent contractor basis." (R. 48-8, 2013 Retention Agreement, PageID # 635). Absent a contract *and* work being specifically assigned thereunder, "special counsel" is an empty title. Finding no authority derived from this title, we cannot say that special counsel are "authorized by law" to perform any duties. They are instead authorized only by contract with the OAG.

The Attorney General suggests that "a fair reading of 'authorized by law' means simply that it was lawful for the Attorney General to direct that [s]pecial [c]ounsel perform duties of the Attorney General's office." This interpretation is obviously flawed. The Attorney General has numerous duties, many of which are lawfully delegated by necessity to his staff at the OAG, not all of whom are officers. A narrower reading of the Attorney General's interpretation could be that only those delegations that are specifically contemplated by statute qualify as being authorized by law. However, as explained above, only an actual delegation (not one that is merely contemplated) falls within the ordinary meaning of the word "authorized." We are left only with the Attorney General's contracting authority to support the Attorney General's position. But the phrase "authorized by law" cannot be construed so as to include all duties and responsibilities entrusted by contract to an independent contractor. To hold otherwise would invite a preposterous result—bestowing officer status

under the Dictionary Act on every independent contractor working on behalf of a state.[7] This cannot be the case. "Interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Guzman v. U.S. Dep't of Homeland Sec.*, 679 F.3d 425, 432 (6th Cir. 2012) (internal quotation marks omitted).

2. "The Duties" of the Office

Turning from "authorized by law," we find another reason to disqualify special counsel as officers under the plain meaning of the Dictionary Act. Mainly, that special counsel *do not* perform "the duties" of any office. The use of the definite article preceding both "duties" and "office" in the Dictionary Act's definition restricts our interpretation of that language. "[T]he word 'the' frequently (but not always) indicates 'a particular thing.'" *NLRB v. Noel Canning*, 573 U.S. ___, 134 S. Ct. 2550, 2561 (2014). It can also be used to refer to something generically, *id.*, as may be the case with "*the* office." By way of example, officers included any person authorized by law to perform the duties of the office *in question*—which

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[7] In Ohio, for example, the Facilities Construction Commission and its Executive Director are tasked with "general supervision over the construction of any projects, improvements, or public buildings constructed for a state agency." Ohio Rev. Code § 123.21(2). The Executive Director, like the Attorney General, is authorized by statute to engage independent contractors to undertake functions specifically prescribed by statute to his or her office. § 123.21(3). Under the Attorney General's interpretation of the Dictionary Act, every independent contractor working on a construction project for a state agency in the State of Ohio would be an officer of the state.

could be the Office of Attorney General *or* some other public office. However, the word "the" that precedes "duties" has only one sensible construction—that it refers to a specific thing—*all duties* associated with the office in question. It would be unreasonable to construe "the," in that instance, to mean "a," "some" or "any," *See, e.g., Sandifer v. U.S. Steel Corp.*, 134 s. Ct. 870, 876 (2014) ("It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." (internal quotation marks omitted)); *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012) ("And it is normal usage that, in the absence of contrary indication, governs our interpretation of texts.").

Special counsel qualify as officers only if they are entitled to perform all duties of some public office.[8] But special counsel are not so entitled. Special counsel cannot perform all duties of the Attorney General's office; nor are they associated with any other public office.[9] A "public office" is "[a] position whose occupant has legal authority to exercise government's *sovereign powers* for a fixed period." *Public Office*, BLACK'S (emphasis added). The authority to collect consumer debts is not a sovereign power; instead, it is a right that can be exercised by any creditor. *See Sovereign Power*, BLACK'S ("The power to

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[8] This interpretation is also consistent with the common understanding of the term "officer." *See Officer*, BLACK'S ("In public affairs, the term refers esp. to a person holding public office under a national, state, or local government and authorized by that government to exercise some specific function.").

[9] The Attorney General has conceded that there is no legislatively designated office of special counsel.

make and enforce laws."); *Sovereign Right*, BLACK'S ("A unique right possessed by a state or its agencies that enables it to carry out its official functions for the public benefit, as distinguished from certain proprietary rights that it may possess like any other private person."). Without a legislatively designated office or the authority to exercise sovereign powers, special counsel are not officers of the State.

B. Officers, Appointment, and Independent Contractors, Generally

Even if the Dictionary Act were inapplicable to this case, our conclusion would be the same. The Attorney General has attributed special weight to the word "appoint," which it is not due. For reasons known only to the legislature, all of the Attorney General's employees are appointed. *See* Ohio Rev. Code § 109.05 ("The attorney general may *appoint* such employees as are necessary." (emphasis added)). Once we remove this guise as the basis for special counsel's authority, the resolution of this issue is readily apparent. The salient distinction between special counsel and the Attorney General's employees, who are also appointed, is special counsel's independent-contractor status. The overwhelming weight of authority sensibly finds that independent contractors are not exempt from FDCPA coverage as officer or employees, pursuant to 15 U.S.C. § 1692a(6)(C). *See, e.g.*, *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1263 (9th Cir. 1996) ("This exemption applies only to an individual government official or employee who collects debts as part of his government employment responsibilities. [The contractor] is a private nonprofit organization with a government contract "); *Pollice v. Nat'l*

Tax Funding, L.P., 225 F.3d 379, 406 (3d Cir. 2000) ("The exemption expressly is limited to 'any officer or employee of the United States or any State' .[And, it] does not extend to those who are merely in a contractual relationship with the government."); *see also Piper v. Portnoff Law Assocs.*, 274 F. Supp. 2d 681, 688 (E.D. Pa. 2003) ("Because the defendants are in a contractual relationship with the City , the municipal officers' exemption does not extend to them."); *Gradisher v. Check Enforcement Unit, Inc.*, 133 F. Supp. 2d 988, 992 (W.D. Mich. 2001) ("This Court agrees with *Brannan* and *Pollice* that an independent contractor is not entitled to an exemption to the FDCPA pursuant to 15 U.S.C. § 1692a(6)(C)."); *Knight v. Schulman*, 102 F. Supp. 2d 867, 876 (S.D. Ohio 1999) ("Since the Defendant was an attorney in private practice, rather than an officer or employee of the United States, he is not excluded from the definition of debt collector, regardless of whether the Defendant was acting as an agent of the United States at the time the letters were written.").

Quite simply, "[t]he legal question raised is whether someone who has been appointed as special counsel to the attorney general is properly characterized as a state officer or employee or as an independent contractor." *Keefer v. Wiles, Boyle, Burkholder & Bringardner, Co., LPA*, Nos. 2:07-CV-1205, 2:07-CV-1288, 2008 WL 4404295, at *3 (S.D. Ohio Sept. 23, 2008) (emphasis added). The Attorney General has legally distanced himself and the OAG from special counsel so that the State of Ohio does not suffer the negative consequences of special counsel's actions. Now, he wishes to see that special counsel get treated as if they are officers of the State of Ohio, directly under his supervision. The Attorney General cannot

have it both ways; special counsel are not officers or employees simply because they *are* independent contractors. No court has held otherwise.[10]

C. Federalism and Policy Concerns

The Attorney General seeks to frame this case a matter of federalism, fundamentally insisting that Congress should have explicitly legislated that an independent contractor is incapable of being an "officer or employee" of the state. For legal authority, the Attorney General points to *Gregory v. Ashcroft* and the "plain statement" rule. *See* 501 U.S. 452, 460 (1991) ("If Congress intends to alter the usual

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[10] Defendants point to a few cases for support, but they are inapposite. In *Bell v. Newnham*, No. L-89-373, 1990 WL 131972, at *2 (Ohio Ct. App. Sept. 14, 1990), the Ohio Court of Appeals held that special counsel was "acting under color of [state] law" for the purposes of a § 1983 suit. The court relied on the fact that the plaintiff had sued special counsel "in his capacity as a state officer or employee," but the court never analyzed the validity of this assumption. Whether or not special counsel were "officers or employees" is insignificant in the § 1983 context, where it is widely accepted that independent contractors may act under color of law. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982) ("To act under color of law does not require that the accused be an officer of the State." (internal quotation marks omitted)). Similarly in *Berridge v. Heiser*, 993 F Supp. 1136, 1143 (S.D. Ohio 1997), the court found that special counsel could be sued under § 1983 if "acting under color of state law." Finally, in *Heredia v. Green*, 667 F.2d 392 (3d Cir. 1981), the Third Circuit found that the defendant was a state officer exempt from FDCPA coverage because he had been appointed a Landlord and Tenant Officer of the court. Like special counsel, the defendant was charged with serving debt notices. Unlike special counsel, the Landlord and Tenant Officer position was prescribed duties by statute and the holder of the position was not in an independent contractual relationship for the purpose of collecting debts. *See id.* at n.3.

constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." (internal quotation marks omitted)). This case is about third-party debt collectors. Ohio is not being regulated; nor is the structure of its government being challenged.

Contrary to Defendants' assertions, special counsel also fail to qualify as officers of the State under Ohio's own law. Section 109.36(A)(1) of the Ohio Revised Code defines an "[o]fficer or employee" as "[a] person who is serving in an elected or appointed office or position with the state or is employed by the state." Defendants conclude that special counsel must be officers because they are "appointed" pursuant to § 109.08 to a "position with the state." Again, the use of the word "appoint" is overstated. The Supreme Court of Ohio itself has recognized that courts should not "read so much into the word 'appointment' because the more significant words in [the statutory definition of 'officer or employee'] are 'office or position with the state.'" *Engel v. Univ. of Toledo Coll. of Med.*, 130 Ohio St. 3d 263, 267 ¶ 18 (2011).[11] The court elaborated by noting that a "public officer must possess some sovereign functions of government to be exercised by him for the benefit of the public either of an executive, legislative, or judicial character." *Id.* at ¶ 19 (internal quotation marks

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[11] Defendants attempt to distinguish this case because the use of the word "appointment" appeared in a letter as opposed to a statute (like § 109.08); however, they fail to recognize that the court specifically identified which words were most important in defining an officer of the state, pursuant to § 109.36(A)(1)—"office or position with the state."

omitted) (emphasis added); *accord Solowitch v. Bennett*, 456 N.E.2d 562, 566 (Ohio Ct. App. 1982) ("The chief and most decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested If official duties are prescribed by statute, and their performance involves the exercise of continuing independent, political or governmental functions, then the position is a public office." (internal quotation marks omitted)). Special counsel exercise neither "sovereign functions" nor "independent, political or governmental functions." Nor are they prescribed by statute any "powers and duties," as is common throughout the code.[12]

Another fair reading of Ohio's "officer or employee" statute is that only individuals "serving in an elected or appointed office" qualify as an officer, whereas those "serving in an appointed position with the state" are merely employees.[13] Special counsel

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[12] *See, e.g.*, Ohio Rev. Code § 109 (Attorney General's powers and duties); § 109.04 ("Powers and duties of first assistant attorney general"); § 109.75 ("Powers and duties of peace officer training commission executive director"); § 111.04 ("Duties of assistant secretary [of State]"); § 121.081 ("Department of insurance – powers and duties"); § 121.083 ("Superintendent of industrial compliance – powers and duties"); § 121.33 ("Office of Hispanic-Latino affairs – powers and duties"); § 121.42 ("Inspector general – powers and duties"); § 1155.011 (Superintendent and deputy superintendent for savings and loan associations and savings banks – powers and duties"); § 118.08 ("Powers, duties, and functions of financial planning and supervision commission"); § 120.04 ("State public defender – powers and duties"); § 120.15 ("County public defender – powers and duties").

[13] Special counsel has explicitly disclaimed the employee designation through contract.

necessarily fall into a third category. independent contractors, because it appears that the legislature failed to distinguish between "officers" and "employees" based on the presumption that all officers are, in fact, employees of the State of Ohio. This interpretation is consistent with another provision of the code, which presumes that every officer has a State-entity employer. *See* § 109.361 ("All expenses in the defense of an officer or employee shall be paid by the employer that employed the officer or employee at the time the alleged act or omission occurred."). However, the State is not special counsel's (nor any independent contractor's) employer.[14] *See Employer*, BLACK'S ("[O]ne who *controls and directs* a worker under an express or implied contract of hire and who pays the workers' salary or wages." (emphasis added)); *Independent Contractor*, BLACK'S ("Someone who is entrusted to undertake a specific project but *who is left free* to do the assigned work and to choose the method for accomplishing it *Unlike an employee*, an independent contractor who commits a wrong while carrying out the work usu[ally] does not create liability for the one who did the hiring." (emphasis added)).

If Special Counsel Defendants truly believed in their status as officers of the State of Ohio, then it begs the question why they are not now represented

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[14] The state could have said "paid by the *agency, office, or department* that employed," or used any other language that did not suggest a specific relationship between the officers and the entity that hired them. We must presume that the Ohio legislature used the words it chose with a full understanding of their common meaning. *Beverage Distribs., Inc. v. Miller Brewing Co.*, 690 F.3d 788, 794 (6th Cir. 2012).

by the Attorney General. *See* Ohio Rev. Code § 109.361 ("Upon the receipt of a written request by an officer or employee, the attorney general *shall* represent and defend the officer or employee in any civil action instituted against the officer or employee."). The answer is simple. Special counsel are not officers because they are independent contractors and not the holders of a public office. *See Advisory Opinion No. 75-016*, Ohio Ethics Commission (August 19, 1975).[15, 16]

If an actual officer or employee of the State of Ohio were collecting these debts, he or she would be exempt from FDCPA coverage. To the extent that this natural interpretation of an "officer of employee," which excludes independent contractors, restricts a state's ability to organize its government, Congress did make a plain statement about a state's right to

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[15] The Ohio Ethics Commission—an independent body responsible for ethics advice and enforcement with respect to the executive branch—was specifically asked to address whether special counsel were officers of the State of Ohio pursuant to § 109.36 to advise attorneys serving as special counsel if they were subject to a state prohibition against officers receiving outside income. The Committee noted that "[s]pecial counsel of the attorney general are not appointed to an office or an instrumentality of the state but are rather engaged as an agent of an elected officer of the state." *Advisory Op. No. 75-016*. Nor were they employed by the state because they "are independent contractors." *Id.*

[16] Defendants also point to § 124.11(A) (Unclassified service – classified service), which lists special counsel alongside of assistant attorneys general as unclassified civil servants. This categorization is meaningless, as it also includes teachers, library staff, nurses, and volunteer firefighters, among many others who are certainly not officers.

seek relief from FDCPA coverage: the Bureau of Consumer Financial Protection is *required* to exempt all "debt collection practices within any State" that are subject to "substantially similar" requirements as under the FDCPA. *See* 15 U.S.C. § 1692o. If special counsel were similarly situated to officers or employees of the State of Ohio, the Ohio Attorney General could have sought an exemption under this provision of the statute. *See* 12 C.F.R. § 1006.1 ("This subpart established procedures and criteria whereby states may apply to the Bureau for exemption of a class of debt collection practices with the applying state from the provisions of the [FDCPA].")

Notably, Congress did create an explicit exemption for certain private entities. *See* 15 U.S.C. § 1692p. The presence of this provision militates against the notion that Congress also intended to exempt independent contractors, generally, from FDCPA coverage without saying so. *See Corely v. United States*, 556 U.S. 303, 314 (2009) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (internal quotation marks omitted)). Congress did not include an exemption for independent contractors similarly situated to special counsel. We will not do so now.

Special counsel are, simply, as their contract with the Attorney General states, independent contractors. Independent contractors are not officers or employees under the plain language of the Dictionary Act. Nor are they officers of the State of Ohio simply because § 109.08 uses the word "appoint." Special counsel do not hold a public office; nor do they wield any sovereign power. The FDCPA specifically sought

to regulate independent debt collectors. Like any other independent debt collector, special counsel are paid only when they actually collect a debt. Congress explicitly referenced this incentive as contributing to the problems attendant with independent debt collectors. *See* S. Rep. No. 95-382, at 2 (1977) ("Collection agencies generally operate on commission, and this has too often created the incentive to collect by any means."). By finding tnat special counsel are subject to the FDCPA prohibitions, we are merely holding that Congress' intended target for regulation—independent debt collectors—are actually subject to the regulation.

II. False, Deceptive, or Misleading Acts and § 1692e Liability

Section 1692e states, "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. This provision, along with its subsections, provides an "extraordinarily broad" base of protection to consumers, *Frey v. Gangwish*, 970 F.2d 1516, 1521 (6th Cir. 1992), and is intended to prevent all abusive debt collection practices by independent debt collectors that tend to deceive or mislead a consumer. *See* 15 U.S.C. § 1692 ("It is the purpose of [the FDCPA] to *eliminate* abusive debt collection practices " (emphasis added)). An inherent danger posed by harassing or deceptive collection practices is that consumers will be pressed into making uninformed decisions about debt prioritization, which affects their daily lives. *See* 15 U.S.C. § 1692 ("Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs "). When the sender

of a letter misrepresents his or her authority, the least sophisticated consumer might reasonably be intimidated, confused, and "feel pressured to immediately pay the debt, even if she disputed its validity." *Barany-Snyder v. Weiner*, 539 F.3d 327, 334 (6th Cir. 2008) (internal quotation marks omitted).

Intimidation is at the heart of this case. There is no compelling reason for special counsel to use the OAG letterhead, other than to misrepresent their authority and place pressure on those individuals receiving the letters. The Attorney General insists that any sense of urgency (*i.e.* intimidation) that is created by the letters is permissible because the State has special authority that a regular creditor does not. This putative authority is not cited in any brief. The Attorney General mentioned at oral argument the power to garnish wages and to withhold lottery winnings. However, these powers are precisely those powers that are granted to *all creditors* after they have received a judgment against the debtor.[17] *See* Ohio Rev. Code § 2716 *et seq.* (allowing for garnishment of wages to judgment creditors); Ohio Admin. Code § 3770:1-8-01(B)(7) (allowing for garnishment of lottery prizes for judgment creditors). Presumably, it is the lack of extraordinary powers with respect to the collection of consumer debts that causes the Attorney General to seek out special counsel with "expertise" in "the securing of judgments" and "post-judgment collections." (R. 48-11, Jones RFQ

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[17] The Attorney General does have special powers with respect to tax debts, which are not at issue in this case. *See, e.g.*, Ohio Rev. Code § 3770.073 ("Satisfying debts to state from lottery prize awards"); § 3770.072 ("State income tax withholding and filing of report").

Response, PageID # 660); *see also* Ohio Rev. Code § 131.02(C) (listing the Attorney General's debt collection options: "The attorney general shall collect the claim *or secure a judgment* " (emphasis added)). The use of the letterhead has no apparent purpose beyond misleading a consumer into believing it is the Attorney General who is collecting on the account. But bad intentions do not result in liability under § 1692e; the debt collection practice must actually be deceptive.

The question before us, then, is whether an unsophisticated consumer could reasonably be misled into thinking she was being contacted by the Ohio Attorney General due to an independent contractor's use of OAG letterhead. If she could, we must also determine whether there is a genuine dispute of material fact as to any confusion that could be created by this debt collection practice under the particular circumstances of this case. Before we answer these questions, an overview of the liability provisions is necessary.

A. Liability Provisions

A debt collector violates § 1692e, put simply, if the collection practice that he uses has the tendency to confuse the least sophisticated consumer. *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 329 (6th Cir. 2006). This is an objective standard, with a relatively low bar so as to cast FDCPA-protection over all consumers, even those who are "gullible" or "naive." *Kistner v. Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433, 438 (6th Cir. 2008). However, because it is an objective standard, we will not sanction "liability for bizarre or idiosyncratic interpretations of collection notices." *Barany-Snyder*, 539 F.3d

at 333 (internal quotation marks omitted). Courts must consider the question of liability in light of the FDCPA's prevailing purpose—to prevent abusive, misleading, and deceptive debt collection practices.

In addition to the general liability provision, the FDCPA enumerates sixteen specific instances of conduct deemed to be *per se* violations of § 1692e. Plaintiffs rely on two of these provisions, §§ 1692e(9) and (14). "Without limiting the general application of the foregoing, the following conduct is a violation of [§ 1692e]":

> (9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.
>
> (14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

15 U.S.C. §§ 16923(9), (14). Only material violations of the § 1692e prohibitions will result in liability.[18]

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[18] Plaintiffs suggest that materiality must be presumed under subsections (9) and (14) because those subsections describe misleading or deceptive means as opposed to false representations. This distinction is overstated. "Materiality is an ordinary element of *any* federal claim based on a false or misleading statement." *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 596 (6th Cir. 2009) (internal quotation marks omitted) (emphasis added). Here, we are concerned whether the means—using OAG letterhead—is making the materially false statement that the letters were, in fact, sent by the Attorney General. Moreover, a materiality requirement is consistent with the legislative intent. *See* S. Rep. 95-382 ("[The FDCPA's] purpose is to pro-

Wallace v. Washington Mut. Bank, F.A., 683 F.3d 323, 326-27 (6th Cir. 2012). But materiality in the FDCPA context is no more than a restatement of the above-referenced standard: a false representation or act is material if it has the tendency to confuse the least sophisticated consumer. *Id.*

B. OAG Letterhead and the Least Sophisticated Consumer

We must decide, given the particular facts of this case and the words written in these letters, whether the least sophisticated consumer would be misled by the use of the OAG letterhead, *or*, if there is any genuine dispute of fact as to whether these letters were misleading. *See Wallace*, 683 F.3d at 326-27 Section 1692e(9) prohibits debt collectors from "simulat[ing]" official documents; from "falsely represent[ing]" that a communication is being "issued" by a government agent; and from distributing communications that "create[] a false impression as to its source." Subsection (14) prohibits the use of "any name other than the true name of the debt collector's business." It is clear that these provisions were violated in the technical sense—Mike DeWine is not the true name of any Defendant, Sarah Sheriff is not a special counsel, and the official letterhead certainly implied that the letter was issued by the OAG. But whether these misrepresentations are material requires further analysis.

Historically, special counsel's use of OAG letterhead has led to confusion. The Attorney General

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tect consumers from a host of unfair, harassing, and deceptive debt collection practices *without imposing unnecessary restrictions* on ethical debt collectors." (emphasis added)).

admitted to receiving phone calls from consumers asking whether the letters were authentic, and if the consumer did in fact woe a debt to the Attorney General. This revelation is unsurprising; many consumers might reasonably be unaware of Ohio's debt certification process and fail to understand why Ohio's chief law enforcement officer is attempting to collect from them. Receiving a bill from a state university, which the consumer actually attended, would naturally be perceived by an average consumer, to say nothing of a naïve or gullible one, as substantially different from receiving a collection letter written on OAG letterhead. The presence of the authoritative symbols at the top of the letter immediately signals to the debtor that it is the State of Ohio that is threatening to take action against her. If the consumer has been deceived, he or she may be overborn, and the precise type of abuse that the FDCPA sought to eradicate has been achieved.

The letter is not, however, the sole representation made by these letters. We must presume that Plaintiffs will read the entirety of the collection notice, with "a basic level of understanding and care." *Kistner*, 518 F.3d at 438-39. Both letters included clear indications that they were sent by an attorney who was acting as a debt collector. There was also some indication that the attorney's role as a debt collector was separate and apart from the OAG. Defendant Jones signed the letter directed to Gillie as "Outside Counsel for the Attorney General's Office." He also used his business address and informed Gillie to contact one of his employees at his law firm. Likewise, Defendant Sarah Sheriff signed the Meadows letter as both an employee of Wiles Law Firm and as special counsel. These representations may

clarify the confusing impact of the letterhead for the least sophisticated consumer, or they may be overshadowed by the larger presence of the Great Seal of Ohio and the Attorney General's name. The inclusion of the title "special counsel" in the signature block says nothing about a debt collector's relationship to the Attorney General; and the representation that a debt collector is acting as outside counsel working for a law firm does not preclude liability. *See Peter v. GC Servs. L.P.*, 310 F.3d 344, 352 (5th Cir. 2002) (finding a violation of § 1692e(14) where a debt collector used its true name in the letter while simultaneously directing the consumer to the government's return address). The independent debt collector may have achieved his desired impact at the point when the letter is opened and the least sophisticated consumer perceives the name of the Attorney General because the least sophisticated consumer may believe that "the price of poker has just gone up." *Avila v. Rubin*, 84 F.3d 222, 229 (7th Cir. 1996).

Both parties, and the court below, believe that summary judgment is appropriate one way or the other, but materiality is a mixed question of law and fact. *See United States v. Gaudin*, 515 U.S. 506, 521 (1995) ("It is commonplace for the same mixed question of law and fact to be assigned to the court for one purpose, and to the jury for another.") And, often "whether a letter is misleading raises a question of fact." *Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 397 (6th Cir. 2015). A letter that contains contradictory information or that tends to send a mixed signal is inherently confusing when it fails to include language that clarifies its meaning. *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 309 (6th Cir. 2003). Use of the letterhead, in our view, is intended

to induce a higher rate of repayment by intimating that the State of Ohio is in fact sending the letter, which may lead the naïve consumer to prioritize this debt above all others for no good reason. But intentions are not always realized and do not necessarily predict the impact of these letters on the least sophisticated consumer. It is not our role as judges to assert with certainty and without verifiable reason which individuals would or would not be misled by these letters. Therefore, we will not do so in this instance. Whether these letters did enough to clarify the initial confusion created by the use of the government letterhead is a question for the jury. *See, e.g.*, *Kistner*, 518 F.3d at 441; *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606, 613 (6th Cir. 2009).

The Wiles Defendants suggest that Meadows could not reasonably have been confused because she had previously entered into an agreement to pay the debt in question and the letter was sent at her request. But this contention rings hollow,[19] and regardless, would not shield Defendants from liability because Meadows did not have to allege harm or actual confusion—the FDCPA is a "strict liability statute." *Fed. Home Loan Mrtg. Corp. v. Lamar*, 503 F.3d 504, 513 (6th Cir. 2007).

Defendants also seek shelter from potential liability by way of qualified immunity, which generally shields "government officials performing discretionary functions from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have

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[19] The letter was generically addressed to "Sir/Madam."

violated."[20] *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). But qualified immunity is inapplicable to an action brought directly under the FDCPA, where Congress has included an explicit exemption from debt collector liability for government officials. *Cf. Andrus v. Glove Const. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied. ").[21]

The Attorney General insists that no deception has occurred in this case because special counsel and the OAG are but one and the same. But they are not.[22]

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[20] Private individuals working on the behalf of the government may also seek the protection of qualified immunity, if offering such protection serves the public interest. *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012). But three of five Defendants—Wiles Law Firm, Jones Law Office, and Sarah Sheriff—had no relationship with the government. *See* (R. 48-8, 2013 Retention Agreement, PageID # 634) ("[T]he appointment of Special Counsel is personal in nature and does not extend to any law firm that Special Counsel is associated with.").

[21] Qualified immunity typically applies to actions brought under § 1983 or pursuant to *Bivens*. We have only extended its coverage to actions brought directly under a federal statute on a few occasions, *see, e.g.*, *Cullinan v. Abramson*, 128 F.3d 301, 312 (6th Cir. 1997) (RICO); *Blake v. Wright*, 179 F.3d 1003, 1011-12 (6th Cir. 1999) (Federal Wiretap Act), and those statutes did not include explicit exemptions for public officials.

[22] *See, e.g.*, (R. 48-8, Retention Agreement, PageID # 634–35) ("No Special Counsel shall be regarded as in the employment of, or as an employee of, the Attorney General or the State Clients"; "Special counsel shall be engaged by the Attorney General solely on an independent contractor basis"; "Special Counsel shall, at its own expense, procure and maintain, during the term of this Agreement, malpractice insurance"; "Special Counsel agrees to indemnify and to hold the Attorney General and the State of Ohio harmless and immune from any and all

The contractual relationship between special counsel and the Attorney General is no different than the relationship between any private, for profit debt collector and the creditors he or she serves. And neither a contractual relationship, nor any power of agency, nor an accurate description by special counsel of their relation to the OAG, precludes liability under the FDCPA. *See Knight v. Schulman*, 102 F. Supp. 2d 867, 876 (S.D. Ohio 1999) ("[R]egardless of whether the Defendant was acting as an agent of the United States at the time the letters were written," the FDCPA applied "[s]ince [he] was an attorney in private practice, rather than an officer or employee of the United States."); *see also McMillan v. Collection Profs., Inc.*, 455 F.3d 754, 761 (7th Cir. 2006) ("[I]n some cases the literal truth may convey a misleading impression.") (internal quotation marks omitted)); *Gradisher v. Check Enforcement Unit, Inc.*, 210 F. Supp. 2d 907, 914 (W.D. Mich. 2002) ("The fact that [the defendant] had an 'affiliation' with the [government] is thus irrelevant because [the defendant's] notices created the false impression that the notices were generated by the [government].").

Special counsel had an affirmative duty as debt collectors to abide by the provisions of the FDCPA. The FDCPA prohibits, as a *per se* deception, the false implication that a collection notice is being sent by a government actor. This deception may inappropriately influence a consumer's decisions by inducing prompt payment, regardless of the debtor's circum-

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claims for injury or damages arising from this Retention Agreement that are attributable to Special Counsel's own actions or omissions or those of his/her partners, associates ").

stances or the accuracy of the alleged indebtedness. That an OAG employee could attain the same leverage against the alleged debtor is not at issue in this case—employees and officers of a state are exempt from the FDCPA. Whether or not the use of the letterhead by special counsel was compelled by the OAG, a jury could reasonably find that special counsel's use of the letterhead is confusing; and therefore a violation of § 1692e, as a materially false, deceptive and misleading practice. We recognize the importance of a state's ability to collect on its own accounts, but once it has assigned debts to an independent, third-party debt collector, the federal rules apply. That is what happened in this case. And special counsel are liable if a jury finds that they have held themselves out as something they are not.

CONCLUSION

Because a jury could reasonably find that the use of the Ohio Attorney General's letterhead by the "special counsel" acting as independent debt collectors, in the manner and under the circumstances present here, to result in deceptive, misleading and false representations in violation of the Fair Debt Collection Practices Act, we hereby **VACATE** the summary judgment in favor of Defendants and **REMAND** this case to the district court with instructions for the district court to submit to the jury the question as to whether these letters were actually confusing to the least sophisticated consumer.

DISSENT

SUTTON, Circuit Judge, dissenting. From the founding, the States have taken debts—whether owed by them or to them—seriously. *Compare Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), with U.S. Const. amend. XI. If States have the sovereign right to set the terms of being sued, *see Alden v. Maine*, 527 U.S. 706, 715–27 (1999), they assuredly have a sovereign right to determine how, when, and whether to collect the myriad debts owed to them. No State to our knowledge employs all of the individuals needed to perform this sovereign function. *See* Nat'l Ass'n of State Auditors, Comptrollers, and Treasurers, *Government Debt Collection: Survey Report and Recommendations* 1–2 (2010), *available at* http://goo.gl/kO7GQ9. The States as a result hire other agents to collect the debts for them. In the State of Ohio, that means the Attorney General hires private lawyers—called "special counsel"—to collect debts on his behalf, to file and settle debt-collection lawsuits with his permission, and to serve at his pleasure. These lawyers become the Attorney General's agents for debt-collection purposes, just as the employees in the Collections Enforcement Section of the Attorney General's Office serve as his agents for these purposes, and together all of them are authorized to stand in his place when recovering the State's money.

Plaintiffs filed this class action against the State's special counsel under the Fair Debt Collection Practices Act, claiming that their debt collection letters were "false and misleading" because they used stationery with the Ohio Attorney General's name on it. That claim has two serious flaws. One is that the Act exempts state "officers" from its coverage. Under the Dictionary Act and the clear-statement rule es-

tablished by *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the deputizing of private lawyers to act as assistant attorneys general makes them "officers" of the State for these collection purposes. Any other interpretation would mean that Congress meant to micromanage how a State structured its law-enforcement and debt-collection efforts and would create grave constitutional concerns along the way. The other flaw is that the special counsels' use of the Ohio Attorney General's stationery and the accurate description of their relationship with the State are not "false and misleading" under the statute. The stationery, which the Attorney General requires each special counsel to use, accurately describes the relevant legal realities—that the law firm acts as an agent of the Attorney General and stands in the shoes of the Attorney General in collecting money owed to the State. Because I would not apply the Fair Debt Collection Practices Act to state sovereign functions that Congress has not regulated and would not prohibit conduct that Congress has not banned, I must respectfully dissent.

I.

The Fair Debt Collection Practices Act prohibits debt collectors from using "false, deceptive, or misleading representation[s] or means in connection with the collection of any debt." 15 U.S.C. § 1692e. Mindful of the sovereign authority of the Federal Government and the States to determine how, when, and through whom to collect government debts, the Act exempts "any officer of the United States or any State to the extent that" debt collection ranks among "his official duties." 15 U.S.C. § 1692a(6)(C). The Dictionary Act defines "officer" as "any person

authorized by law to perform the duties of the office." 1 U.S.C. § 1. Outside counsel hired to handle governmental duties fit that definition to a tee.

Begin with the phrase "authorized by law." To "authorize" is '[t]o give legal authority," "to employer," or "to sanction." *Black's Law Dictionary* (10th ed. 2014). That is what Ohio's special-counsel statute does. It empowers the Attorney General to "appoint special counsel to represent the state" in connection with its debts, and it permits any action those private lawyers take when they invoke their attorney-general-given authority. Ohio Rev. Code § 109.08. But for the statute, the Attorney General has no power to hire private lawyers as contractors, and private lawyers have no power to speak on his (and by extension the State's) behalf. Section 109.08, to wrap up, is a "law" that "authorize[s]" special counsel to act.

Now consider the other key phrase: "the duties of the office." An "office" is a "position whose occupant has legal authority to exercise a government's sovereign power for a fixed period." *Black's Law Dictionary* (10th ed. 2014). Special counsel fit this bill as well. They serve one-year renewable terms in a position created and empowered by statute. In their hand rests nothing less than a portion of the Attorney General's sovereign power to "enforce" the civil code the Ohio legislature has crafted—"one of the quintessential functions of a State"—by in this instance collecting money due the State. *Diamond v. Charles*, 476 U.S. 54, 65 (1986); *see Associated Builders & Contractors v. Perry*, 16 F.3d 688, 692 (6th Cir. 1994). That may explain why, after Georgia lost *Chisholm* before the Supreme Court and was forced

to come to federal court to defend debt-collection efforts against it, the Supreme Court proceeded to lose *Chisholm* before the People. *See* U.S. Const. amend. XI. These are quintessentially sovereign functions concerning the People's money. Special counsel hired to perform core sovereign functions count as "officers" exempt from the Fair Debt Collection Practices Act's sweep.

Even if one thinks that the Dictionary Act's definition of "officer" is ambiguous in this context, the exemption still applies. When Congress purports to regulate core state functions, it must do so unambiguously. *Gregory*, 501 U.S. at 470. The *Gregory* clear-statement admonition bars courts from construing ambiguous federal statutes to "trench on the States' arrangements for conducting their own governments." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004). "If Congress intend[s] to recalibrate state and federal power in an area that has traditionally been the province of state government," it must be clear in doing so. *Jackson v. Sedgwick Claims Mgmt. Servs., Inc.*, 731 F.3d 556, 567 (6th Cir. 2013) (en banc).

Who can deny that plaintiffs' interpretation of "officer" "trench[es] on the States' arrangements for conducting their own governments"? *Nixon*, 541 U.S. at 140. The States' sovereign authority gives them power to structure their legal departments as they please, and their "varied" and "pragmatic" approaches have produced a "staggering[ly] divers[e]" array of governance arrangements. *Avery v. Midland Cnty.*, 390 U.S. 474, 482-83 (1968). As is its sovereign right, Ohio has empowered its Attorney General to deputize third parties to shoulder some of his duties.

He may appoint special counsel to "represent the state in civil actions, criminal prosecutions, or other proceedings in which the state is a party," Ohio Rev. Code § 109.07; to "act as attorney at law in any antitrust case" for the State and its residents, *id.* § 109.81; to "exercise al rights, privileges, and powers of prosecuting attorneys" in organized-crime cases, *id.* § 109.83; to "initiate and prosecute" violations of Ohio's workers compensation laws, *id.* § 109.84—and to "represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection," *id.* § 109.08.

Nor does Ohio stand alone in this regard. *Every* State has delegated at least some of its debt-collection power to a non-State body. Sometimes that is the federal government, which in fiscal year 2013 collected more than $3 billion in delinquent debts on behalf of all fifty States. U.S. Dep't of the Treasury, *Fiscal Year 2013 Annual Report to the States: Treasury Offset Program Delinquent Debt Collections* 4 (2014), *available at* http://goo.gl/6O70u1; *see* 31 C.F.R. § 285.8. But other times that is a private entity. *See, e.g.*, Idaho Code Ann. § 67-2358(1); Or. Rev. Stat. § 293.231; Wash. Rev. Code § 19.16.500. One State's collections-assignment scheme bears more than a passing resemblance to Ohio's. California's Franchise Tax Board hires private contractors to collect debts on the State's behalf and authorizes them to "refer" debts "for litigation by [their] legal representatives in the name of the Franchise Tax Board" itself. Cal. Rev. & Tax Code § 19376(b). Interpreting the Fair Debt Collection Practices Act to regulate special counsel's activities undermines the State's decision to allocate law enforcement responsibilities between the Attor-

ney General and his agents however the State sees fit. Absent a clear congressional directive, federal courts have no license to interfere with that choice.

Plaintiffs, notably, concede that "[t]he term 'officer' is ambiguous" and "open to multiple[] yet reasonable interpretations." Reply Br. at 5. That should be the end of this case. Their inability to argue that the statute is unambiguous *in their favor* means the *Gregory* clear-statement rule answers the question presented: "officers" includes special counsel authorized by the Attorney General to handle specific government functions, including the collection of the State's debts.

Plaintiffs offer several contrary arguments, all unpersuasive. *First*, they raise a canon of their own: Remedial statutes must be construed liberally. *See Cobb v. Contract Transp., Inc.*, 452 F.3d 543, 559 (6th Cir. 2006). But we know that canon does not trump the *Gregory* clear-statement rule because *Gregory* itself involved a remedial statute, the Age Discrimination in Employment Act, and the Supreme Court insisted on a clear statement all the same.

Second, plaintiffs seek solace in two circuit court decisions holding that independent contractors cannot be officers: *Pollice v. National Tax Funding, L.P.*, 225 F.3d 379 (3d Cir. 2000), and *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260 (9th Cir. 1996). Neither case helps them. In *Pollice*, a municipal government *sold* its debts to a debt collector, 225 F.3d at 389, eliminating the possibility that the collector was somehow an officer of the government in collecting the debt *for the government*. And in *Brannan*, the collector and not the government owned the debt in the first place. 94 F.3d at 1262.

In this case, by contrast, the State of Ohio remains the ultimate creditor and thus its agents—special counsel—collect the debts on the State's behalf.

Third, plaintiffs argue that Congress could not have intended the state-officer exception to include special counsel because the Fair Debt Collection Practices Act has a separate provision giving the State an out: It may ask the federal Consumer Financial Protection Bureau to exempt special counsel from the Act's requirements. 15 U.S.C. § 1692o. That misunderstands how this relief valve functions. The Act permits the Bureau to exempt "any class of debt collection practices" subjected by state law to "substantially similar" consumer-protection requirements. *Id.* The relevant question is whether state law regulates a certain debt-collection *practice* as stringently as federal law, not whether the debt collectors carrying on that practice are "substantially similar" to *entities* the Act exempts. At any rate, the premise of this argument is false. Plaintiffs have not argued, nor have we found any indication, that the State's consumer-protection law regulates the Attorney General's use of his own letterhead.

Fourth, plaintiffs argue that Ohio does not treat special counsel as state officers under its own law for some purposes. But the question at hand is how the federal Fair Debt Collection Practices Act treats "officers," not how state law treats the term for some purposes. The only relevant state law question is whether the state law duties of special counsel satisfy the federal definition of "officer." They do. Even if state law definitions of "officer" *were* relevant, plaintiffs mischaracterize how Ohio uses the term for this purpose: debt collection. The state statute regulating

collection agencies defines such agencies as persons "who, for compensation, offer[] services to collect an alleged debt asserted to be owed to another." Ohio Rev. Code § 1319.12(A)(1). Just like its federal counterpart, it exempts "[a]ny public officer" from its terms, *id.* § 1319.12(A)(2)(e)—and Ohio courts define "officer" the same way the Dictionary Act does. "[T]he chief and most decisive characteristic of a public office," the Ohio Supreme Court has held, "is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law." *Engel v. Univ. of Toledo Coll. of Med.*, 957 N.E.2d 764, 768 (Ohio 2011). Ohio courts applying that definition accord no significance to the fact that a particular appointee may *also* be an independent contractor whose statutorily prescribed duties are fleshed out by the terms of his contract. *See Solowitch v. Bennett*, 456 N.E.2d 562, 566 (Ohio Ct. App. 1982). All of this explains why Ohio regards even the Deputy Registrar of the Bureau of Motor Vehicles, an independent contractor under the statute, as an "officer." *Id.*

Finally, plaintiffs urge us to limit the Dictionary Act's definition because every state contractor would otherwise qualify as an "officer." Any such slope is not as steep or as slick as they imagine. The Ohio Facilities Construction Commission, cited by the majority in support of plaintiffs' view, proves the point: There is nothing "sovereign" about the power to "construct[] and repair" a state agency's buildings, Ohio Rev. Code § 123.21, and sovereign power remains a precondition of officer status. In other respects, the Dictionary Act's definition reads expansively because the definition is expansive. Congress knows how to supersede a Dictionary Act default and has done so

before: Title 5 defines "officer" as someone (1) "required by law to be appointed in the civil service" by the President, certain agency heads, or a federal court; (2) "engaged in the performance of a Federal function"; and (3) "supervis[ed]" by a limited group of people. 5 U.S.C. § 2104. Other restrictive definitions exist. To qualify as a principal officer under the National Constitution, a person must be presidentially appointed and senatorially approved, swear an oath of office, and "exercis[e] significant authority pursuant to the laws of the United States." *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 506 & n.9 (2010). Congress did not deviate from the Dictionary Act when drafting the Fair Debt Collection Practices Act. I would respect that choice and *Gregory*'s command that any ambiguity in the statute be construed in a way that does not interfere with how the State chooses to handle this core state function: debt collection.

II.

Even if the Fair Debt Collection Practices Act somehow covered debt-collection efforts by special counsel on behalf of the State, plaintiffs face another problem. The Act does not transform the special counsels' use of the Ohio Attorney General's stationery into "false," "deceptive," or "misleading" actions under the statute any more than it would do the same if a special counsel listed his or her name and firm under the Ohio Attorney General's name and address in a brief filed in this Court.

Recall the distribution of authority the special-counsel statute creates. Special counsel are the Attorney General's agents, authorized to stand in his place when collecting Ohio debts. As their contracts

makes clear, they "provide legal services" on the Attorney General's behalf. R. 48-8 at 2. They may file and settle lawsuits with the Attorney General's permission. *Id.* at 5. The Collections Enforcement Section of the Office of the Attorney General assigns them specific debts to collect, then audits their performance. *Id.* at 3. The State does not sell the debts to special counsel, and they thus remain debts of the State. *Id.* at 6. As a consequence, special counsel are no different from assistant attorneys general paid to recover the State's money. That is how the Attorney General treats them. Assistant attorneys general "frequently" help special counsel draft pleadings, and sometimes sign on as co-counsel when a "particularly sensitive or complex" case demands it. *See* R. 24 at 21. Assistant attorneys general even stand in for special counsel (and special counsel for assistant attorneys general) when illness strikes or when distance makes travel impractical, even if the replacement has not been formally assigned to the debt. *Id.*; *see Shapiro v. Ohio Attorney Gen.*, 725 N.E.2d 1232, 1235 (Ohio Ct. App. 1999). It thus should come as no surprise that the Attorney General *requires* his debt-collection agents to use his official stationery. *See* R. 5 at 2. In this context, an agent who uses his principal's letterhead speaks the truth; he does not say anything false or misleading.

Consider the plaintiffs' theory of liability under 15 U.S.C. § 1692e(9). That provision prohibits the use of letters that "simulate[]" or are "falsely represented" to be "document[s] authorized, issued, or approved by" a State, or that "create[] a false impression as to [their] source, authorization, or approval." *Id.* A document with the Attorney General's letterhead, it is no doubt true, gives the impression that it

comes from the Attorney General. But special counsel's dunning letters *do* come from the Attorney General. And plaintiffs have not produced any evidence that *these* special counsel exceeded the scope of their debt-collection authority under state law or the Attorney General's guidance.

Now consider plaintiffs' theory of liability under 15 U.S.C. § 1692e(14). That provision prohibits debt collectors from using "any business, company, or organization name other than the true name of the debt collector's business, company, or organization." Plaintiffs argue that, by employing the Attorney General's letterhead, special counsel "use" a "name other than the true name" of their law firms. Wrong again. Nothing about § 1692e(14) prohibits special counsel from affiliating themselves with the Office of the Ohio Attorney General. Although the statute never says what a "true name" is, its import is straightforward: A debt collector may not lie about his institutional affiliation. As the Federal Trade Commission, one of the federal agencies responsible for enforcing the Act, recognizes, a debt collector may use multiple names in his various affairs as long as the names "do[] not misrepresent his identity or deceive the consumer." Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,107 (Dec. 13, 1988). Here too the principal-agent relationship resolves the dispute. Special counsel may lawfully use the Attorney General's letterhead because, as his agents, they represent him in debt-related affairs.

An analogy makes the point. Many insurance agents are independent contractors. *See Weary v. Cochran*, 377 F.3d 522, 526 (6th Cir. 2004). Some

insurance agents are themselves separately incorporated. But no one bats an eye when an insurance agent working for John Doe Insurance Agency, Inc. uses Nationwide Mutual Insurance Co. letterhead when selling Nationwide insurance products on Nationwide's behalf. Just as there is nothing remotely untrue or misleading about using that letterhead, there is nothing remotely untrue or misleading about using this letterhead.

Plaintiffs offer several theories to resist this conclusion. Theory one: The letterhead misrepresents a special counsel's authority because state law purportedly prohibits special counsel from using the Attorney General's letterhead to collect these debts. But plaintiffs offer no caselaw to that effect. And Ohio's top legal official, the Attorney General, has said otherwise. He requires *all* special counsel performing debt collection on his behalf to use his letterhead, whether in the context of unpaid taxes or other state debts. *See* R. 5 at 2. Notably, plaintiffs *do not* argue that the Attorney General has violated state law. *See* R. 31 at 3 (affirmatively waiving the argument). In this setting, a private law firm cannot plausibly be tagged with liability under the Act for false or misleading acts when it *complies* with the directions of the State's top legal official about a matter of state law. The only thing that could be false or misleading in this setting would be to send out dunning letters on the *law firm's stationery*.

Theory two: The letterhead tricks debtors into believing they are being contacted by the Attorney General when they are in fact being contacted by someone else. That does not make sense either. Special counsel *are* the Attorney General when it

comes to debt collection, and as his agents possess just as much authority to invoke his name as an assistant attorney general or another of his employees. It makes no difference that special counsel are deemed independent contractors by contract, thanks to a basic principle of agency law: A person need not be a principal's employee to be that principal's agent. "[N]othing about the title independent contractor invariably precludes someone from being an agent under appropriate circumstances." *United States v. Hudson*, 491 F.3d 590, 595 (6th Cir. 2008) (citing *Restatement (Second) of Agency* § 2 cmt. b (1958)). For that inquiry, it does not matter whether special counsel work in the Attorney General's office building or their own office building, whether they use the Attorney General's computers or their own computers, whether they are insured by the Attorney General or by their own policies. The only question that matters is whether they exercise the Attorney General's debt-collection powers as his agents. They do.

Theory three: The letterhead confuses debtors into thinking that debts owed to the State of Ohio are more significant than a debt owed to a private entity such as a bank. Plaintiffs do not spell out the source of this alleged intimidation, but a few possibilities come to mind. One is the institutional affiliation printed on the letterhead: "Mike DeWine, Ohio Attorney General." *See* Appendix. But that is the same institutional affiliation conveyed by the letters' signature blocks. *E.g.*, *id.* ("Outside Counsel for the Attorney General's Office."). Plaintiffs conceded at argument that the Act does not bar special counsel from referencing their job title in their signatures. The letterhead's content thus cannot supply a cognizable basis for this claim.

Another possibility turns on the creditor itself: the State of Ohio. An official communication from the State could intimidate an unsophisticated consumer into thinking that the consequences of failing to pay this debt (as opposed to private debts) are more severe. But that fear is justified and anything but unsophisticated. From the perspective of a consumer, debts owed to Ohio (and other governments) *do* have consequences not shared by debts owed to private parties. For example, the State may deduct what it is due from a taxpayer's refund, whether the refund comes from the Federal Government, the State, or a local government. *See, e.g.*, Ohio Rev. Code § 5703.77(D) (credit account balances); *id.* § 5726.31 (financial institutions tax); *id.* § 5747.12 (income tax); 31 C.F.R. § 285.8 (federal tax). That is not true with respect to private debts. Debts owed to governments also take priority over most private debts in state probate proceedings. *See* Ohio Rev. Code § 2117.25(A). The special consequences of state debts explain why the Act bars debt collectors *unaffiliated* with a State from using the State's name to scare debtors into paying. When the State itself is doing the demanding, however, nothing about the resulting fear misleads. And when special counsel communicate with debtors, they stand in the State's shoes, just as the Attorney General would stand in the State's shoes if he pursued delinquent debtors himself. The only thing misleading in this setting would be to suggest (through a law firm letterhead alone) that this *was not a state debt*.

The last possibility is that the use of the Attorney General's letterhead evokes *un*justified fears: fear of the Attorney General "stop[ping] or delay[ing]" a pending bankruptcy. R. 48-2 at 1, or fear of being

charged with a crime, R. 48-3 at 2. But neither of the milquetoast letters in the record threatens criminal prosecution, civil penalties, or any action whatsoever. *See* Appendix. The letter to Pamela Gillie simply invites her to "make arrangements to pay" if she cannot satisfy her obligation in full, while the letter to Hazel Meadows simply discloses her current balance owed. *Id.* Not even the least sophisticated consumer could infer anything from these letters other than the reality that these were indeed state debts.

Theory four: The letterhead misleads debtors into thinking that special counsel are *not* associated with the State when in fact they are. True, the Office of the Attorney General has received calls from debtors worried that a special-counsel dunning letter is a scam. But that implies the letters do not say *enough* about how tightly knit the Attorney General and special counsel are—an implication that contradicts plaintiffs' entire theory of liability.

All of this may explain why the only circuit to confront an analogous governmental debt-collection practice has rejected plaintiffs' argument. *See Heredia v. Green*, 667 F.2d 392 (3d Cir. 1981). In *Heredia*, the Philadelphia Municipal Court appointed defendant Edward Green as a "landlord and tenant officer," as state law authorized it to do, and ordered him to deliver delinquency notices on the Court's behalf. *Id.* at 393, 395. Recognizing Green as an "officer," the Third Circuit turned aside plaintiffs' claims under the Fair Debt Collection Practices Act's officer exemption. To hold otherwise would place Green "in the anomalous position of being exposed to personal monetary liability for deceptively giving the impression that he was acting as an officer of the

court despite the fact that his actions had indeed been authorized by that court." *Id.* at 396 (Stern, J., concurring). As for *Peter v. GC Servs., L.P.*, 310 F.3d 344 (5th Cir. 2002), the Fifth Circuit never considered the relationship between the government and the defendants and thus never considered the agency question presented here.

The majority seeing things differently, I respectfully dissent.

APPENDIX

[BOTH TEXT AND IMAGES OF LETTERS REPRODUCED HERE]

[Attorney General Mike DeWine letterhead]

EXHIBIT A1
May 24, 2012

Pamela Gillie
2392 ROSECREST ST.
Grove City, OH 43123-8464

Reference: 8460030
Balance: $2227.46

Dear Sir/Madam,

You have chosen to ignore repeated attempts to resolving the referenced 8460030 medical claim. If you cannot make immediate full payment call DENISE HALL at Eric A. Jones, L.L.C., 614-545-9997 at my office to make arrangements to pay this debt.

THIS IS A COMMUNICATION FROM A DEBT COLLECTOR. THIS IS AN ATTEMPT TO COLLECT A DEBT. ALL INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

Sincerely,

/s/ Eric A. Jones

Eric A. Jones
Outside Counsel for the
Attorney General's Office
Telephone: 614-545-9998
Fax: 614-224-9300

RETURN THIS PORTION WITH YOUR PAYMENT

SEND PAYMENT TO:

Law Office of Eric A. Jones, L.L.C.
580 South High Street, Suite 100
Columbus, OH 43215

If paying by credit card, check box and please fill out below

[VISA] [MASTERCARD]

Card Number _____

V-Code__ (3 digit code on back of card) Exp. Date___

Amt. Paid_____

Print Name_____

Signature_____

MED3-1

Mike DeWine
Ohio Attorney General

EXHIBIT A1

May 24, 2012

Pamela Gillie 181353
2392 ROSECREST ST
Grove City, OH 43123-8464

Reference: 8460030
Balance: $2227.46

Dear Sir/Madam,

You have chosen to ignore repeated attempts to resolving the referenced 8460030 medical claim. If you cannot make immediate full payment call DENISE HALL at Eric A. Jones, L.L.C., 614-545-9997 at my office to make arrangements to pay this debt.

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Sincerely,

Eric A. Jones

Eric A. Jones
Outside Counsel for the
Attorney General's Office
Telephone: 614-545-9998
Fax: 614-224-9300

RETURN THIS PORTION WITH YOUR PAYMENT

SEND PAYMENT TO:

Law Office of Eric A. Jones, L.L.C.
510 South High Street, Suite 100
Columbus, OH 43215

IF PAYING BY CREDIT CARD, CHECK BOX AND PLEASE FILL OUT BELOW

☐ [illegible] ☐ [illegible]

Card Number _____

V-Code _____ [illegible] Exp. Date _____

Amt. Paid _____

Print Name _____

Signature _____

MED3-1

[Office of the Ohio Attorney General
Collections Enforcement Section letterhead]

EXHIBIT B1

July 20, 2012

HAZEL MEADOWS
587 SOUTH HARRIS AVENUE
COLUMBUS OH 43204

Re: STATE OF OHIO – UNIVERSITY OF AKRON
v. HAZEL MEADOWS
Amount of Claim: $2,581.07
*Our File No. 37430.001

Sir/Madam:

Per your request, this is a letter with the current balance owed for your University of Akron loan that has been placed with the Ohio Attorney General. Feel free to contact me at 614-221-2073 should you have any further questions.

Very truly yours,

/s/ Sarah Sheriff

Wiles, Boyle, Burkholder & Bringardner Co., LPA
300 Spruce Street
Columbus, Ohio 43215
Special County to the Attorney General for the State of Ohio

NOTICE – This is an attempt to collect a debt. Any information that we obtain will be used for that purpose. We will assume this debt to be valid unless you dispute the validity of all or any part of it within 30 days of receipt of this letter. If you notify us in writing you dispute all or part of the debt, we will obtain and send to you verification of the debt or a copy of

the judgment against you. Upon written request within 30 days after receipt of this notice, we will provide you with the name and address of the original creditor, if different from the creditor named above. We are debt collectors.

***IMPORTANT – PLEASE REFER TO OUR FILE NO. IN ALL COMMUNICATION**

EXHIBIT B1

Office of the Ohio Attorney General
Collections Enforcement Section

July 20, 2012

HAZEL MEADOWS
587 SOUTH HARRIS AVENUE
COLUMBUS OH 43204

RE: STATE OF OHIO - UNIVERSITY OF AKRON
v. HAZEL MEADOWS
Amount of Claim: $2,581.07
*Our File No: 37430.001

Sir/Madam:

Per your request, this is a letter with the current balance owed for your University of Akron loan that has been placed with the Ohio Attorney General. Feel free to contact me at 614-221-2073 should you have any further questions.

Very truly yours,

Sarah Sheriff

Sarah Sheriff
Wiles, Boyle, Burkholder & Bringardner Co., LPA
300 Spruce Street
Columbus, Ohio 43215
Special Counsel to the Attorney General for the State of Ohio

NOTICE - This is an attempt to collect a debt. Any information that we obtain will be used for that purpose. We will assume this debt to be valid unless you dispute the validity of all or any part of it within 30 days of receipt of this letter. If you notify us in writing that you dispute all or part of the debt, we will obtain and send to you verification of the debt or a copy of the judgment against you. Upon written request within 30 days after receipt of this notice, we will provide you with the name and address of the original creditor, if different from the creditor named above. We are debt collectors.

* IMPORTANT - PLEASE REFER TO OUR FILE NO. IN ALL COMMUNICATION

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 2:13-cv0212
Judge Graham
Magistrate Judge Deavers
Filed: August 12, 2014

Pamela Gillie, et al.,

Plaintiffs,

v.

Law Office of Eric A. Jones, LLC, et al.,

Defendants.

OPINION AND ORDER

This matter is before the Court on the parties' Cross-Motions for Summary Judgment (docs. 47-51, 70). The Plaintiffs commenced the instant action against certain attorneys and their law offices that the Ohio Attorney General (OAG) has appointed to act as special counsel to collect debts owed to the State of Ohio. The Plaintiffs are Ohio residents who received at least one debt-collection letter written on the OAG's official letterhead from the Defendants. The Plaintiffs allege that the Defendants' use of the OAG's letterhead in their collections communications violates the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq*, and seek to represent a class of similarly situated consumers. For the

following reasons, the Court: GRANTS the Defendants' Motions for Summary Judgment (docs. 47 & 51); DENIES the Plaintiffs' Motions for Summary Judgment (docs. 48-50); DENIES the OAG's Motion for Judgment on the Pleadings (doc. 46) and Motion for Summary Judgment (doc. 70); and DENIES AS MOOT the Plaintiffs Motion to Dismiss for Failure to State a Claim (doc. 41).

I. Background

The Attorney General is Ohio's chief law enforcement officer. O.R.C. § 109.02. Pursuant to Ohio law, the OAG is charged with collecting debts owed to state entities. O.R.C. § 131.02. To assist him with his collection efforts, the OAG "may appoint special counsel to represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect." O.R.C. § 109.08. Once appointed, special counsel execute standardized contracts with the OAG. OAG Counterclaim at ¶ 11, doc. 5. These contracts require, *inter alia*, special counsel to use official OAG letterhead for all collection activities. Id. at ¶¶ 8, 22.

In 2012, the OAG appointed Defendants Eric Jones and Mark Sheriff as special counsel to assist in the collection of debts pursuant to O.R.C. § 109.08. Defendant Jones operated the Law Office of Eric A. Jones, L.L.C. Defendant Mark Sheriff worked as a partner at Wiles, Boyle, Burkholder & Bringardner (the Wiles Law Firm). Defendant Sarah Sheriff worked in the collections department of the Wiles Law Firm. Ms. Sheriff was not appointed special counsel but assisted Mr. Sheriff in his collection efforts on behalf of the OAG.

In the spring of 2012, Plaintiff Pamela Gillie received a letter from Defendant Eric Jones of The Law Office of Eric A. Jones, LLC. Def. Jones's Letter, doc. 48-2. The OAG's letterhead appeared at the top of the letter. Id. It included the official state seal, the Attorney General's name, and the Attorney General's title. Id. The letter stated, "Dear Sir/Madam, You have chosen to ignore repeated attempts to resolving [sic] the referenced medical claim. If you cannot make immediate full payment call Denise Hall at Eric A. Jones, L.L.C., at my office to make arrangements to pay this debt." Id. The letter further explained that it was a communication from a debt collector and that the letter was an attempt to collect a debt. Id. In the signature block, Defendant Jones signed his name, noted that he was "Outside Counsel for the Attorney General's Office," and provided contact information at which he could be reached. Id. The letter further instructed Gillie to send payment to the Law Office of Eric A. Jones, L.L.C., and provided means of paying the debt discussed in the body of the letter. Id.

Later that summer, Plaintiff Hazel Meadows received a letter from Defendant Sarah Sheriff of the Wiles Law Firm. Def. Sheriff's Letter, doc. 48-4. The OAG's letterhead appeared at the top of the letter. Id. It included the official state seal next to the heading "Office of the Ohio Attorney General, Collection Enforcement Section." Id. The letter stated, "Sir/Madam: Per your request, this is a letter with the current balance owed for your University of Akron loan that has been placed with the Ohio Attorney General. Feel free to contact me should you have any further questions." Id. Defendant Sarah Sheriff signed the letter, included the name and address of

her law firm, and noted that she was "Special Counsel to the Attorney General for the State of Ohio." Id.

On March 5, 2013, the Plaintiffs filed a five-count Complaint (doc. 1) against the Defendants, alleging multiple violations of the FDCPA, 15 U.S.C. § 1692 *et seq*. The Plaintiffs assert that the Defendants' use of the OAG's letterhead was false, deceptive, or misleading. Specifically, the Plaintiffs allege that the Defendants:

(1) falsely represented or implied that they are vouched for, bonded by, or affiliated with the State of Ohio in violation of 15 U.S.C. § 1692e(1);

(2) used written communications which falsely represented to be a document authorized, issued or approved by the State of Ohio, or created a false impression that the OAG was the source of the letters, authorized the letters, or approved the letters in violation of 15 U.S.C. § 1692e(9);

(3) used false representation or deceptive means to collect or attempt to collect debts from the Plaintiffs in violation of 15 U.S.C. § 1692e(10); and

(4) used OAG letterhead in violation of 15 U.S.C. § 1692e(14)'s requirement that debt collectors use the "true name" of their business or company.[1]

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[1] In the alternative to the fourth count of the Complaint, the Plaintiffs allege that the Law Firm Defendants, as opposed to the individual attorney defendants, used OAG letterhead in vio-

Compl. at 15–19, doc. 1.

Shortly after the filing of the Complaint in this case, the Ohio Attorney General filed a Motion to Intervene as Defendant and Counterclaimant (doc. 3). In his counterclaim, the OAG requests a declaratory judgment stating that special counsel's use of OAG letterhead is not a violation of the FDCPA and that the OAG and State of Ohio are immune from liability under the FDCPA. OAG's Answer at 22, doc. 5. The Court subsequently granted the OAG's Motion to Intervene.

After granting the OAG's Motion, the Court stayed discovery and requested additional briefing on the issue of bifurcating this case. In late 2013, the Court issued a written Opinion and Order (doc. 42) bifurcating the issues of liability and damages and directing the parties to file dispositive motions within 60 days of the Court's Order. The Plaintiffs filed a Motion to Dismiss the OAG's Declaratory Judgment Claims (doc. 41). The parties subsequently filed cross-motions for summary judgment (doc. 47–51, 70) regarding the Defendants' alleged liability for violations of the FDCPA.[2] The Court held an oral hearing on the parties' cross-motions for summary judgment on June 10, 2014. The matter is now fully briefed and ripe for resolution.

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lation of 15 U.S.C. § 1692e(14)'s requirement that debt collectors use the "true name" of their business or company.

[2] The OAG filed a Motion for Judgment on the Pleadings (doc. 46) on its counterclaims, which the Court construed as a motion for summary judgment, see Order (doc. 69).

II. Standard of Review

Under Federal Rule of Civil Procedure 56, summary judgment is proper if the evidentiary material in the record shows that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see Longaberger Co. v. Kolt, 586 F.3d 459, 465 (6th Cir. 2009). The moving party bears the burden of proving the absence of genuine issues of material fact and its entitlement to judgment as a matter of law, which may be accomplished by demonstrating that the nonmoving party lacks evidence to support an essential element of its case on which it would bear the burden of proof at trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986); Walton v. Ford Motor Co., 424 F.3d 481, 485 (6th Cir. 2005).

The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986); see also Longaberger, 586 F.3d at 465. "Only disputed material facts, those 'that might affect the outcome of the suit under the governing law,' will preclude summary judgment." Daugherty v. Sajar Plastics, Inc., 544 F.3d 696, 702 (6th Cir. 2008) (quoting Anderson, 477 U.S. at 248). Accordingly, the nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." Moore v. Philip Morris Cos., Inc., 8 F.3d 335, 340 (6th Cir. 1993).

A district court considering a motion for summary judgment may not weigh evidence or make credibility

determinations. Daugherty, 544 F.3d at 702; Adams v. Metiva, 31 F.3d 375, 379 (6th Cir. 1994). Rather, in reviewing a motion for summary judgment, a court must determine whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-52. The evidence, all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 456 (1992). However, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson, 477 U.S. at 252; see Dominguez v. Corr. Med. Servs., 555 F.3d 543, 549 (6th Cir. 2009).

III. Cross-Motions for Summary Judgment

"The Fair Debt Collection Practices Act is an extraordinarily broad statute." Frey v. Gangwish, 970 F.2d 1516, 1521 (6th Cir. 1992). Its purpose is to "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). To that end, the Act prohibits debt collectors from making "false, deceptive, or misleading communications in connection with the collection of any debt." 15 U.S.C. § 1692e.

Here, the Plaintiffs maintain that the Defendants' use of the OAG letterhead was false, deceptive, or misleading in violation of § 1692e. In order to establish a claim under § 1692e: (1) the plaintiff must be a "consumer" as defined by the Act; (2) the "debt" must arise out of transactions which are "primarily for personal, family or household purposes"; (3) the defendant must be a "debt collector" as defined by the Act; and (4) the defendant must have violated § 1692e's prohibitions. Wallace v. Wash. Mut. Bank, F.A., 683 F.3d 323, 326 (6th Cir. 2012). Here, the parties contest the third and fourth elements. The Court addresses each of these elements in turn.

A. Are special counsel "debt collectors" under the FDCPA?

The FDCPA applies to entities who are considered "debt collectors." Montgomery v. Huntington Bank, 346 F.3d 693, 698 (6th Cir. 2003). The term "debt collector" is defined by the Act as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). However, the FDCPA specifically excludes "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties" from the definition of "debt collector." 15 U.S.C. § 1692a(6)(C).

The Plaintiffs argue that § 1692a(6)(C)'s exception does not apply to special counsel because they are independent contractors, rather than government officers or employees. According to the Plaintiffs, spe-

cial counsel executed Retention Agreements with the OAG that explicitly state that special counsel are independent contractors and not government employees or officers. To support their argument, the Plaintiffs cite numerous cases concluding that independent contractors are not covered by § 1692a(6)(C)'s exception.

In contrast, special counsel insist that they are appointed pursuant to statute and are therefore government officers or employees that fall within § 1692a(6)(C)'s exception. Consequently, they conclude that they are not debt collectors and therefore not subject to the FDCPA.

The case law addressing § 1692a(6)(C) is sparse. On the one hand, courts readily apply § 1692a(6)(C)'s exception to individuals that are clearly government officers or employees. See, e.g., Al-Sharif v. United States, 296 F. App'x 740, 742 (11th Cir. 2008) (applying § 1692a(6)(C)'s exception to IRS agents); Streater v. Cox, No. 07-11163, 2008 WL 564884, at *3 (E.D. Mich. Feb. 28, 2008) (applying § 1692a(6)(C)'s exception to Michigan Assistant Attorney Generals); Masterson v. Meade Cnty. Fiscal Court, et. al., 489 F. Supp. 2d 740, 757–58 (W.D. Ky. 2007) (applying § 1692a(6)(C)'s exception to county officials). On the other hand, courts generally do not apply § 1692a(6)(C)'s exception to private individuals and entities in a purely contractual relationship with the government. See, e.g., Pollice v. Nat'l Tax Funding, 225 F.3d 379, 406 (3d Cir. 2000) (holding that § 1692a(6)(C) applies only to state "officers" or "employees" and that it "does not extend to those who are merely in a contractual relationship with the government"); Brannan v. United Student Aid Funds,

Inc., 94 F.3d 1260, 1263 (9th Cir. 1996) (§ 1692a(6)(C) "applies only to an individual government official or employee who collects debts as part of his government employment responsibilities. USA Funds is a private nonprofit organization with a government contract; it is not a government agency or employee."); Piper v. Portnoff Law Assoc., 274 F Supp. 2d 681, 683 (E.D. Pa. 2003) (finding that law firm contractually bound to collect debts on behalf of municipality did not fall within FDCPA exception for government officers); Gradisher v. Check Enforcement Unit, Inc., 133 F Supp. 2d 988, 992 (W.D. Mich. 2001) ("[A]n independent contractor is not entitled to an exemption to the FDCPA [I]f the legislature had intended to allow independent contractors, rather than just government agencies and employees, to escape liability under the FDCPA, it could have explicitly stated as much.").

The facts of this case are distinct from the cases cited above. Here, special counsel are appointed pursuant to Ohio statute but are also in a contractual relationship with the OAG. To establish whether special counsel are "debt collectors" under the FDCPA, the Court must determine whether special counsel are an "officer or employee," 15 U.S.C. § 1692a(6)(C), of the State of Ohio.

"When presented with a matter of statutory interpretation, we begin with the language of the Act itself." Ashland Hosp. Corp. v. Serv. Emps. Intern. Union, Dist. 1199 WV/KY/OH, 708 F.3d 737, 741 (6th Cir. 2013) (collecting cases). "If the meaning of the Act's language is plain, we give it effect and our analysis comes to an end." Id. (citing United States v. Ron Pair Enters., 489 U.S. 235, 240–41 (1989)).

The FDCPA does not define the terms "officer" or "employee" See 15 U.S.C. § 1692a(6). Therefore, the Court's analysis begins with the Dictionary Act, which provides rules for interpreting "any Act of Congress, unless the context indicates otherwise," 1 U.S.C. § 1. See Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2014 WL 2921709, at *14 (June 30, 2014) ("RFRA itself does not define the term 'person.' We therefore look to the Dictionary Act, which we must consult '[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise.' 1 U.S.C. § 1."). The Dictionary Act defines the term "officer" as "any person authorized by law to perform the duties of the office." 1 U.S.C. § 1. Nothing in the FDCPA indicates that the Dictionary Act's definition of "officer" should not apply in the context of 15 U.S.C. § 1692a(6).

Here, one of the OAG's duties as chief law enforcement officer for the State of Ohio is the collecting of debts owed to state entities. O.R.C. § 131.02. To assist him with the duties of his office, the OAG appoints special counsel pursuant to statute "to represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect." O.R.C. § 109.08. In other words, special counsel are authorized by law to perform the duties of the OAG with respect to the collection of debts owed to the State of Ohio. The Court therefore concludes that special counsel are "officers" within the meaning of the term as used in 15 U.S.C. § 1692a(6)(C) and, consequently, finds that special counsel are not "debt collectors" under the FDCPA.

The Plaintiffs place great weight on the Retention Agreements executed by special counsel and the OAG. The language of those agreements supports the proposition that special counsel are independent contractors. The Retention Agreement for special counsel provides:

> Special Counsel is being appointed hereunder to provide legal services on behalf of the Attorney General to one or more State Clients. Special counsel will render services to this Retention Agreement as an independent contractor. Special counsel, whether for purposes of applications of Ohio. R.C. Chapter 102, Section 8.86 or Section 9.87, or for any other purpose, shall not be regarded as "in the employment of", or as an employee of, the Attorney General or any State Client.
>
> During the term of this appointment, Special Counsel shall be engaged by the Attorney General solely on an independent contractor basis[.]

Retention Agreement for Collections Special Counsel at 2, doc. 48-7. See also Fiscal Year 2013 Retention Agreement Collections Special Counsel at 2, doc. 48-8 (using almost identical language to describe special counsel as "independent contractors" and not state employees).

Even so, the Court is not persuaded that the language of the Retention Agreements should control the Court's interpretation of § 1692a(6)(C) as informed by the Dictionary Act's definition of "officer." The Plaintiffs' position would require the Court to ignore the fact that special counsel are appointed by

the OAG pursuant to Ohio statute for the specific purpose of collecting debts owed to the State of Ohio. The Plaintiffs take an overly narrow view of special counsel's authority and fail to consider the significance of this authority given the meaning of the term "officer" as used in § 1692a(6)(C). The Court finds the Plaintiffs' arguments unpersuasive.

Finally, the Plaintiffs argue, a 1975 advisory opinion issued by the Ohio Ethics Commission of the Ohio Supreme Court clearly establishes that special counsel are nothing more than independent contractors. In its advisory opinion, the Commission considered whether special counsel appointed pursuant to O.R.C. § 109.08 were "elected or appointed to an office of or employed by" a state entity and, consequently, were prohibited from receiving compensation for services in any case or proceeding before other state entities pursuant to O.R.C. § 102.04(A). Ohio Eth. Com., 1975 WL 184266 (Aug. 19, 1975). Reviewing § 102.04(A), the Commission concluded that special counsel "are not within the purview of Section 102.04 of the Revised Code by virtue of being 'elected to an office' nor do they seem to be 'appointed to an office' of an instrumentality of the state." Id. at *1. The Commission then considered whether special counsel were employees of the OAG and found that special counsel were independent contractors not subject to § 102.04(A)'s restrictions. Id. at *2-*4.

The Court first notes that the opinion of a state ethics commission is not binding upon the federal courts. More significantly, the Commission's advisory opinion interpreted a provision of state law unrelated to the FDCPA, the federal statute at issue in this case. The Commission's advisory opinion may

very well be correct as a matter of state law, but that is beside the point here. The definition of the term "officer" as used in § 1692a(6)(C) of the FDCPA sweeps broadly and includes "any person authorized by law to perform the duties of the office," 1 U.S.C. § 1. Because the Commission's advisory opinion does not address the statute and definition at issue in the present case, it does not alter the Court's conclusion that special counsel are not debt collectors under the terms of the FDCPA. Special counsel are therefore entitled to summary judgment as a matter of law. [3]

B. Did the Defendants Violate the FDCPA?

Assuming *arguendo* that the Defendants are debt collectors under the FDCPA, the Court considers whether the Defendants violated the FDCPA. The

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[3] In an effort to avoid the time and expense of class-wide discovery, this Court previously stayed discovery in this case in its September 6, 2013 Order (doc. 28). After bifurcating the issues of liability and damages, the Court directed the parties to file dispositive motions as to the individual plaintiffs in this case. December 4, 2013 Order, doc. 42. The Plaintiffs did not file a motion for leave to conduct discovery and proceeded to submit motions for summary judgment. "A plaintiff pursuing a claim under the FDCPA bears the burden of establishing that the defendant is a debt collector within the meaning of the FDCPA." Passa v. City of Columbus, 748 F Supp. 2d 804, 810 (S.D. Ohio 2010) (citing Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56, 60 (2nd Cir. 2004)). Here, the Plaintiffs offer no evidence that the Law Firm Defendants or Defendant Sarah Sheriff are debt collectors under the FDCPA. See Schroyer v. Frankel, 197 F.3d 1170, 1176 (6th Cir. 1999) (discussing type of evidence necessary to establish that a law firm is a "debt collector" under the FDCPA). In the interest of fairness, given the lack of discovery in this case, the Court resolves the issue of the Law Firm Defendants' and Defendant Sarah Sheriff's liability on alternative grounds.

Plaintiffs allege that the Defendants violated four subsections of 15 U.S.C. § 1692e: 1692e(1), 1692e(9), 1692e(10), and 1692e(14). Respectively these subsections prohibit:

> [t]he false representation or implication that the debt collector is vouched for, bonded by, or affiliated with any State, 15 U.S.C. § 1692e(1);
>
> [t]he use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any official or agency of any State, or which creates a false impression as to its source, authorization, or approval, id. at § 1692e(9);
>
> [t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer, id. at § 1692e(10); and
>
> [t]he use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization, id. at § 1692e(14).

15 U.S.C. § 1692e. The Plaintiffs offer detailed arguments as to the violation of each of these subsections. The thrust of their arguments is that special counsel's use of the OAG letterhead violates the FDCPA because it misleads consumers as to the source of the debt collection letters and falsely implies that the letters are from the OAG instead of special counsel and their law firms. In the Plaintiffs' view, special counsel's use of the OAG letterhead is meant to intimidate consumers and pressure them

into paying special counsel, contrary to the purpose of the FDCPA.

To determine whether a communication is "false, deceptive or misleading," courts examine the communication under a "least sophisticated consumer" standard.[4] Wallace v. Wash. Mut. Bank, F.A., 683 F.3d 323, 326 (6th Cir. 2012). This is an objective standard. See Harvey v. Great Seneca Fin. Corp., 453 F.3d 324, 331 (6th Cir. 2006) ("courts apply an objective test based on the understanding of the least

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[4] In their filings, the parties treat the question of whether the Defendants have violated 15 U.S.C. § 1692e as a question of law for the Court to decide. However, in the Sixth Circuit, courts submit close cases under § 1692e to a jury. See Kistner v. Law Offices of Michael P. Margelefsky, LLC, 518 F.3d 433, 440–41 (6th Cir. 2008). As one district court judge has helpfully explained:

> In applying the "least sophisticated consumer" standard, the Sixth Circuit has adopted the "more than one reasonable interpretation standard." Kistner, 518 F.3d at 441. Under that approach, a collection letter can be "deceptive" if it is open to "more than one reasonable interpretation, at least one of which is inaccurate." Id. (quoting Clomon v. Jackson, 988 F.2d 1314, 1319 (2d Cir. 1993)). "[T]he 'more than one reasonable interpretation' standard is applicable to the entirety of § 1692e as a useful tool in analyzing the least sophisticated consumer test." Id. Therefore, where a letter could be susceptible to more than one reasonable interpretation and one of these interpretations is inaccurate, there is a question of fact for the jury to decide. Id.

Samples v. Midland Credit Mgmt., Inc., No. 3:12–cv–00099, 2012 WL 2576392, at *7 (M.D. Tenn. July 2, 2012). Because the Court concludes that there is only one reasonable interpretation of the letters in question, the Court considers the question of whether the Defendants have violated 15 U.S.C. § 1692e as a question of law.

sophisticated consumer") (internal quotations omitted)). The least sophisticated consumer test is designed "to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd." Kistner v. Law Offices of Michael P. Margelefsky, LLC, 518 F.3d 433, 438 (6th Cir. 2008) (quotations and citation omitted). This standard "preserv[es] a quotient of reasonableness and presum[es] a basic level of understanding and willingness to read with care." Fed. Home Loan Mortg. Corp. v. Lamar, 503 F.3d 504, 510 (6th Cir. 2007) (citation omitted). See also Miller v. Javitch, Block & Rathbone, 561 F.3d 588, 595 (6th Cir. 2009) (citing Lamar, 503 F.3d at 510) (recognizing that the least sophisticated consumer standard assumes that the communication at issue "is read in its entirety, carefully, and with some elementary level of understanding").

Further, to establish a violation of § 1692e, a communication must be materially false or misleading, that is, the statement must be technically false, and one which would tend to mislead or confuse the reasonable unsophisticated consumer. Wallace, 683 F.3d at at 326-27. The parties disagree as to whether the materiality requirement applies to each of § 1692e's subsections. The Plaintiffs insist that the materiality standard only applies to § 1692e(10), the statute's catch-all provision. In their view, the conduct prohibited in the remaining § 1692e subsections is a *per se* violation of the FDCPA. In contrast, the Defendants argue that the materiality standard applies to all of § 1692e's subsections.

The Defendants have the better argument in light of Sixth Circuit precedent. In Miller, the Sixth Circuit rejected the plaintiff's claims under § 1692e(2),

§ 1692e(10), and § 1692e(12) on materiality grounds. 561 F.3d at 596. The court stated:

> Writing for the Seventh Circuit, Judge Easterbrook recently observed that "[m]ateriality is an ordinary element of any federal claim based on a false or misleading statement." Seeing no "reason why materiality should not equally be required in an action based on § 1692e," Judge Easterbrook found a statement "false in some technical sense" immaterial. "A statement cannot mislead unless it is material, so a false but non-material statement is not actionable." We agree.

Id. (internal citations omitted). The court reiterated its commitment to the materiality standard in Wallace, asserting that, in applying the least sophisticated consumer standard, "a statement must be materially false or misleading to violate Section 1692e." 83 F.3d at 326. Continuing, the court observed that "[t]he materiality standard simply means that in addition to being technically false, a statement would tend to mislead or confuse the reasonable unsophisticated consumer." Id. at 326–27 Characterizing the plaintiff's claims as arising under § 1692e(2) and § 1692e(10), id. at 324 n.1, the court found that "a clearly false representation of the creditor's name" might satisfy this standard, id. at 327.

In the Court's view, these Sixth Circuit decisions control its analysis here. Both the Miller and Wallace courts applied the materiality standard to claims under multiple subsections of § 1692e. Neither decision limited the application of the materiality standard to 1692e's general prohibition on the "use any false, deceptive, or misleading representa-

tion or means in connection with the collection any debt" or § 1692e(10)'s catch-all provision, which prohibits "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." Therefore, the Court will apply the materiality standard to the Plaintiffs' claims in this case.

Here, the collection letters include the OAG's letterhead prominently in the header. Defendant Jones's letter to Plaintiff Gillie states, "Dear Sir/Madam, You have chosen to ignore repeated attempts to resolving [sic] the referenced medical claim. If you cannot make immediate full payment call Denise Hall at Eric A. Jones, L.L.C., at my office to make arrangements to pay this debt." Def. Jones's Letter, doc. 48-2. Defendant Sarah Sheriff's letter to Plaintiff Meadow states, "Sir/Madam: Per your request, this is a letter with the current balance owed for your University of Akron loan that has been place with the Ohio Attorney General. Feel free to contact me should you have any further questions." Def. Sheriff's Letters, doc. 48-4. Both letters explain that they are communications from a debt collector and that the letters are an attempt to collect a debt. The letters are signed by special counsel in their individual capacity and identify themselves as "Special Counsel to the Attorney General for the State of Ohio" or "Outside Counsel for the Attorney General's Office." The letters include the names and addresses of the Defendants' law firms.[5]

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[5] The name and address of Defendant Jones's law firm is not included in the signature block of his letter. See Def. Jones's Letter. Instead, it is listed as the return address on the payment ticket at the bottom of the letter. Id. Defendant Sarah

When "read in [their] entirety, carefully, and with some elementary level of understanding," Miller, 561 F.3d at 595, the Court finds that the least sophisticated consumer would not be materially misled by the Defendants' letters in this case. In sending these letters, special counsel act as representatives of the State of Ohio appointed by the OAG to collect debts owed to the State. O.R.C. § 109.08 (the OAG appoints special counsel pursuant to statute "to represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect"). The letters accurately reflect this relationship.

Defendant Sarah Sheriff's letter to Plaintiff Meadows requires additional analysis. During the relevant time period, pursuant to a 2008 agreed judgment, Plaintiff Meadows made monthly payments to the Wiles Law Firm for a debt she owed to the State Ohio. M. Sheriff Aff. at ¶¶ 4-5, doc. 60-2. In 2012, Plaintiff Meadows contacted Defendant Sarah Sheriff at the Wiles Law Firm and asked for her remaining balance as to that debt. Sheriff Aff. at ¶ 9, doc. 60-1. Defendant Sarah Sheriff sent the letter at issue in this case in response to Plaintiff Meadows' request. Id. at ¶¶ 9-10. In her letter, Defendant Sarah Sheriff informed Plaintiff Meadows of the then

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Sheriff provides the name and address of her firm in the signature block of her letter. See Def. Sheriff's Letter, doc. 48-4. The Court concludes that special counsel's inclusion of the names of their law firms in the letters in question was not materially misleading. The letters accurately described special counsel's place of employment and provided a physical location at which special counsel could be contacted.

current balance of Plaintiff Meadows' debt and signed her name above a signature block listing her title as "Special Counsel to the Attorney General for the State of Ohio." Def. Sheriff's Letter, doc. 48-4. It is undisputed that Defendant Sarah Sheriff was not appointed special counsel by the OAG. It is also undisputed that the letter's contents were otherwise accurate and responsive to Plaintiff Meadows' request. When viewed objectively in this context, Defendant Sarah Sheriff's signature with the title of special counsel is not materially misleading. The least sophisticated consumer in Plaintiff Meadows' position could not be confused as to the source of Defendant Sarah Sheriff's letter because Plaintiff Meadows contacted the Defendants and requested the information provided in the letter. Defendant Sarah Sheriff is therefore entitled to summary judgment.

The Plaintiffs place great weight on special counsel's use of the OAG letterhead. In their view, the letterhead misleads consumers as to the source of the letters in this case.[6] But this argument ignores spe-

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[6] The FDCPA prohibits "[t]he use or distribution of any written communication which creates a false impression as to its source, authorization, or approval." 15 U.S.C. § 1692e(9). "Courts have generally limited the application of § 1692e(9) to egregious situations where the debt collector overtly impersonates a government agency or where it attempts to hide its identity by using a false alias." Sullivan v. Credit Control Servs., Inc., 745 F. Supp. 2d 2, 10 (D. Mass. 2010). See also Buckalew v. Suttel & Hammer, P.S., No. CV–10–3002–LRS, 2010 WL 3944477, at *2 (E.D. Wash. Oct.7, 2010) (same). Given the official relationship between the OAG and special counsel, the letters here do not indicate that special counsel were overtly impersonating the OAG or attempting to hide their identity.

cial counsel's statutory and contractual relationship with the OAG. Whether special counsel or the OAG are the source of the letters, special counsel act on behalf of the OAG to collect debts owed to the State. Any initial confusion that the least sophisticated consumer might experience upon seeing the OAG's name and letterhead is dispelled by special counsel's signature in which they identify themselves and their relationship to the OAG.

Because the letters in this case are not subject to "more than one reasonable interpretation," Kistner, 518 F.3d at 441, the Court concludes as a matter of law that the Defendants did not violate 15 U.S.C. § 1692e in this case. The Defendants are therefore entitled to summary judgment.

The FDCPA also prohibits debt collectors from using "any business, company, or organization name other than the true name of the debt collector's business, company, or organization" in a debt collection communication. 15 U.S.C. § 1692e(14). The Plaintiffs insist that special counsel violated this subsection by using the OAG's name in their communications to debtors. "The aim of § 1692e(14) is to prevent debt collectors from using a name other than [their] own in an attempt to mislead or deceive a consumer." Weinstein v. Fink, No. 99 C 7222, 2001 WL 185194, *5 (N.D. Ill. Feb. 26, 2001). Although the Plaintiffs may be correct that the OAG's name is not special counsel's "true name," it is unclear to the Court how the inclusion of the OAG's name is materially misleading in light of special counsel's identification of their relationship with the OAG. "[T]he cases in which a violation of § 1692e(14) have been found typically involve a debt collector misrepresenting its identity, such as by purporting to be the creditor when it is not, purporting to be a government agency when it is not, or purporting to be distinct from the creditor when it is not." Mahan v. Retrieval-Masters Credit Bureau, Inc., 777 F. Supp. 2d 1293, 1300 (S.D. Ala. 2011). In the Court's view, this case does not involve such conduct on the part of special counsel.

IV Request for Declaratory Judgment

With his Answer (doc. 24), the OAG filed a counterclaim against the Plaintiffs, seeking a declaration that: (1) special counsel's use of the OAG letterhead does not violate any provision of the FDCPA and (2) the OAG and State of Ohio are immune from liability under the FDCPA. The Plaintiffs filed a Motion to Dismiss the OAG's Counterclaim (doc. 41) on December 20, 2013. The OAG filed a Motion for Judgment on the Pleadings (doc. 46) concerning its counterclaim on February 3, 2014. The Court converted the OAG's Motion to a motion for summary judgment, (doc. 69), and the OAG filed his Motion for Summary Judgment (doc. 70) on May 7, 2014 accordingly.

The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). The Supreme Court has "repeatedly characterized the Declaratory Judgment Act as 'an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant.'" Wilton v. Seven Falls Co., 515 U.S. 277, 287 (1995) (quoting Public Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 241 (1952)). The general considerations for determining whether to exercise jurisdiction in a declaratory judgment action are whether the judgment "will serve a useful purpose in clarifying and settling the legal relationships in issue" and whether it "will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." Grand Trunk

Western R.R. v. Consolidated Rail Corp., 746 F.2d 323, 326 (6th Cir. 1984). The court in Grand Trunk set forth the following factors to be considered when applying these principles:

> (1) whether the declaratory action would settle the controversy;
>
> (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue;
>
> (3) whether the declaratory action is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata;"
>
> (4) whether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction; and
>
> (5) whether there is an alternative remedy which is better and more effective.

Id.

The Court declines to exercise its jurisdiction over the OAG's declaratory judgment request here. With respect to the OAG's request that the Court declare that special counsel's use of the OAG letterhead does not violate the FDCPA,[7] the court believes that the

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[7] With respect to the OAG's request that the Court declare the State of Ohio and the OAG immune from liability under the FDCPA, the Court notes that multiple courts have found that the FDCPA does not contain an express and unequivocal waiver of sovereign immunity. Wagstaff v. United States Dep't of Educ., 509 F.3d 661, 664 (5th Cir. 2007); Ha v. United States Dep't of Educ., 680 F. Supp. 2d 45, 47 (D.D.C. 2010); United

parties' motions for summary judgment are better and more effective vehicles for "clarifying and settling the legal relationships in issue" and "afford[ing] relief from the controversy giving rise to the [instant] proceeding." Grand Trunk Western R.R., 746 F.2d at 326. In ruling on the parties' motions for summary judgment, the Court was able to address (1) whether special counsel were "debt collectors" under the FDCPA and (2) whether the specific letters sent by special counsel violated the FDCPA. A ruling on the OAG's declaratory judgment request is unnecessary given the Court's holding as to these issues.

V Conclusion

For the foregoing reasons, the Court: GRANTS the Defendants' Motions for Summary Judgment (docs. 47 & 51); DENIES the Plaintiffs' Motions for Summary Judgment (docs. 48-50); DENIES the OAG's Motion for Judgment on the Pleadings (doc. 46) and Motion for Summary Judgment (doc. 70); and DENIES AS MOOT the Plaintiff's Motion to Dismiss for Failure to State a Claim (doc. 41).

IT IS SO ORDERED.

S/ James L. Graham
James L. Graham
UNITED STATES DISTRICT JUDGE

DATE: August 12, 2014

States v. Errigo, No. 08–CV–12506, 2009 WL 127863, at *2 (E.D. Mich. Jan. 20, 2009); Little v. Tenn. Student Assistance Corp., 537 F. Supp. 2d 942, 944 (W.D. Tenn. 2008) (Donald. J.); Sorrell v. Ill. Student Assistance Comm'n, 314 F Supp. 2d 813, 817 (C.D. Ill. 2004). This supports the OAG's position that the State of Ohio and the OAG is immune from liability under the FDCPA.

APPENDIX D

15 U.S.C.A. § 1692a

§ 1692a. Definitions

As used in this subchapter –

(1) The term "Bureau" means the Bureau of Consumer Financial Protection.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of

which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

APPENDIX E

15 U.S.C.A. § 1692e

§ 1692e. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of—

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the

debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

APPENDIX F

Ohio Rev. Code § 109.08

109.08 Special counsel to collect claims; letterhead stationery

The attorney general may appoint special counsel to represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect.

Such special counsel shall be paid for their services from funds collected by them in an amount approved by the attorney general.

The attorney general shall provide to the special counsel appointed to represent the state in connection with claims arising out of Chapters 5733., 5739., 5741., and 5747. of the Revised Code the official letterhead stationery of the attorney general. The special counsel shall use the letterhead stationery, but only in connection with the collection of such claims arising out of those taxes.

APPENDIX G

Ohio Rev. Code § 131.02

131.02 Collection of moneys due state; interest; compromise of claim or extending time to pay; limitation of actions

(A) Except as otherwise provided in section 4123.37, section 5703.061, and division (K) of section 4123.511 of the Revised Code, whenever any amount is payable to the state, the officer, employee, or agent responsible for administering the law under which the amount is payable shall immediately proceed to collect the amount or cause the amount to be collected and shall pay the amount into the state treasury or into the appropriate custodial fund in the manner set forth pursuant to section 113.08 of the Revised Code. Except as otherwise provided in this division, if the amount is not paid within forty-five days after payment is due, the officer, employee, or agent shall certify the amount due to the attorney general, in the form and manner prescribed by the attorney general, and notify the director of budget and management thereof. In the case of an amount payable by a student enrolled in a state institution of higher education, the amount shall be certified within the later of forty-five days after the amount is due or the tenth day after the beginning of the next academic semester, quarter, or other session following the session for which the payment is payable. The attorney general may assess the collection cost to the amount certified in such manner and amount as prescribed by the attorney general. If an amount payable to a political subdivision is past due, the political subdivision may, with the approval of the attorney general, certify the

amount to the attorney general pursuant to this section.

For the purposes of this section, the attorney general and the officer, employee, or agent responsible for administering the law under which the amount is payable shall agree on the time a payment is due, and that agreed upon time shall be one of the following times:

(1) If a law, including an administrative rule, of this state prescribes the time a payment is required to be made or reported, when the payment is required by that law to be paid or reported.

(2) If the payment is for services rendered, when the rendering of the services is completed.

(3) If the payment is reimbursement for a loss, when the loss is incurred.

(4) In the case of a fine or penalty for which a law or administrative rule does not prescribe a time for payment, when the fine or penalty is first assessed.

(5) If the payment arises from a legal finding, judgment, or adjudication order, when the finding, judgment, or order is rendered or issued.

(6) If the payment arises from an overpayment of money by the state to another person, when the overpayment is discovered.

(7) The date on which the amount for which an individual is personally liable under section 5735.35, section 5739.33, or division (G) of section 5747.07 of the Revised Code is determined.

(8) Upon proof of claim being filed in a bankruptcy case.

(9) Any other appropriate time determined by the attorney general and the officer, employee, or agent responsible for administering the law under which the amount is payable on the basis of statutory requirements or ordinary business processes of the state agency to which the payment is owed.

(B)(1) The attorney general shall give immediate notice by mail or otherwise to the party indebted of the nature and amount of the indebtedness.

(2) If the amount payable to this state arises from a tax levied under Chapter 5733., 5739., 5741., 5747., or 5751. of the Revised Code, the notice also shall specify all of the following:

(a) The assessment or case number;

(b) The tax pursuant to which the assessment is made;

(c) The reason for the liability, including, if applicable, that a penalty or interest is due;

(d) An explanation of how and when interest will be added to the amount assessed;

(e) That the attorney general and tax commissioner, acting together, have the authority, but are not required, to compromise the claim and accept payment over a reasonable time, if such actions are in the best interest of the state.

(C) The attorney general shall collect the claim or secure a judgment and issue an execution for its col-

lection.

(D) Each claim shall bear interest, from the day on which the claim became due, at the rate per annum required by section 5703.47 of the Revised Code.

(E) The attorney general and the chief officer of the agency reporting a claim, acting together, may do any of the following if such action is in the best interests of the state:

(1) Compromise the claim;

(2) Extend for a reasonable period the time for payment of the claim by agreeing to accept monthly or other periodic payments. The agreement may require security for payment of the claim.

(3) Add fees to recover the cost of processing checks or other draft instruments returned for insufficient funds and the cost of providing electronic payment options.

(F)(1) Except as provided in division (F)(2) of this section, if the attorney general finds, after investigation, that any claim due and owing to the state is uncollectible, the attorney general, with the consent of the chief officer of the agency reporting the claim, may do the following:

(a) Sell, convey, or otherwise transfer the claim to one or more private entities for collection;

(b) Cancel the claim or cause it to be canceled.

(2) The attorney general shall cancel or cause to be canceled an unsatisfied claim on the date that is forty years after the date the claim is certified.

(3) No initial action shall be commenced to collect any tax payable to the state that is administered by the tax commissioner, whether or not such tax is subject to division (B) of this section, or any penalty, interest, or additional charge on such tax, after the expiration of the period ending on the later of the dates specified in divisions (F)(3)(a) and (b) of this section, provided that such period shall be extended by the period of any stay to such collection or by any other period to which the parties mutually agree. If the initial action in aid of execution is commenced before the later of the dates specified in divisions (F)(3)(a) and (b) of this section, any and all subsequent actions may be pursued in aid of execution of judgment for as long as the debt exists.

(a) Seven years after the assessment of the tax, penalty, interest, or additional charge is issued.

(b) Four years after the assessment of the tax, penalty, interest, or additional charge becomes final. For the purposes of division (F)(3)(b) of this section, the assessment becomes final at the latest of the following: upon expiration of the period to petition for reassessment, or if applicable, to appeal a final determination of the commissioner or decision of the board of tax appeals or a court, or, if applicable, upon decision of the United States supreme court.

For the purposes of division (F)(3) of this section, an initial action to collect a tax debt is commenced at the time when any action, including any action in aid of execution on a judgment, commences after a certified copy of the tax commissioner's entry making an assessment final has been filed in the office of the clerk of court of common pleas in the county in which

the taxpayer resides or has its principal place of business in this state, or in the office of the clerk of court of common pleas of Franklin county, as provided in section 5739.13, 5741.14, 5747.13, or 5751.09 of the Revised Code or in any other applicable law requiring such a filing. If an assessment has not been issued and there is no time limitation on the issuance of an assessment under applicable law, an action to collect a tax debt commences when the action is filed in the courts of this state to collect the liability.

(4) If information contained in a claim that is sold, conveyed, or transferred to a private entity pursuant to this section is confidential pursuant to federal law or a section of the Revised Code that implements a federal law governing confidentiality, such information remains subject to that law during and following the sale, conveyance, or transfer.

No. 15-338

In The
Supreme Court of the United States

MARK J. SHERIFF, ET AL.,

Petitioners,

v.

PAMELA GILLIE AND HAZEL MEADOWS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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October 19, 2015

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QUESTIONS PRESENTED

Petitioners fail to identify sufficiently compelling reasons to grant this Petition to review the underlying decision of the Sixth Circuit Court of Appeals ("Sixth Circuit").

1. There is no reason for the Court to review the Sixth Circuit's determination that independent contractors like "special counsel" are not "officers" within the meaning of 15 U.S.C. §1692a(6)(C) under the Fair Debt Collections Practices Act ("FDCPA").

2. There is no reason for the Court to reconsider the Sixth Circuit's determination that "special counsel's" use of the Ohio Attorney General ("OAG") letterhead stationery to collect consumer debts could materially mislead the least sophisticated consumer in violation of 15 U.S.C. §1692e(9) and (14).

PARTIES TO THE PROCEEDINGS

Plaintiffs-Appellants below and Respondents here are Pamela Gillie and Hazel Meadows.

Defendants-Appellees below and Co-Petitioners here are Mark J. Sheriff (also referred to herein as "special counsel"), Sarah Sheriff, and Wiles, Boyle, Burkholder & Bringardner Co., L.P.A.

Intervenor-Defendant below and Co-Petitioner here is the Ohio Attorney General, Michael DeWine.

Eric A. Jones (also referred to herein as "special counsel") and the Law Office of Eric A. Jones, LLC was also a Defendant-Appellee below who has filed a separate Petition for Writ of Certiorari.

RULE 29.6 STATEMENT

Respondents, Pamela Gillie and Hazel Meadows are individuals, making this statement inapplicable.

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INTRODUCTION

Petitioners' first argument is based upon concerns over federalism. Pet. at 15-18. Petitioners theorize that collection of State university hospital and tuition bills is tantamount to the exercise of "core state functions" or "sovereign powers" – irrespective of whether the State outsourced the exercise to third-party, independent contractors selected by the OAG from the marketplace. Pet. at 1-6; 17 Here, the independent contractors are known as "special counsel." Petitioners argue on the one hand that because the OAG's independent contractors collect debts of the State, and because collection is in their view a core governmental function, "special counsel" can qualify as an "officer" within the meaning of 15 U.S.C. §1692a(6)(C). On the other hand, Petitioners assert that ambiguity exists in the FDCPA as to the definition of "officer" and as such, application of the FDCPA to the OAG's independent contractors would violate the "clear statement rule." Pet. at 13-17

The Sixth Circuit rejected Petitioners' position by recognizing that Respondents' case does not involve the OAG or the State of Ohio outside of a factual reference to the State entities to whom Respondents owed money. Pet. App. 39a. Collections of consumer debts of the types at issue are not the exercise of "core state functions." Rather, they are proprietary rights enjoyed by the State, private individuals and business entities alike. Respondents' FDCPA suit only seeks relief against private, for-profit, independent contractors who violated several FDCPA sections

including 15 U.S.C. §§1692e(9) and (14). Pet. App. 39a.

Petitioners' federalism argument fails largely due to its dependency upon circular reasoning. Petitioners ask the Court to expand the definition of the term "officer" within the meaning of the FDCPA to protect the OAG's independent contractors. However, Petitioners argue that the FDCPA cannot apply because it is ambiguous. As a predicate to even broaching the federalism topic, Petitioners must demonstrate that the "debt collectors" subject to FDCPA regulation are indeed "*the* State." The FDCPA does in fact clearly answer this question. It measures the extent to which its provisions reach the activities of both the United States and the States, by asking whether the actor at issue is an "officer or employee to the extent that collecting or attempting to collect any debt is in the performance of his official duties." 15 U.S.C. §1692a(6)(C).

Had he been sued, the OAG would be exempt from liability because he is a State "officer." Neither the OAG nor the State of Ohio was sued. Moreover, Petitioners concede, as they must, that "special counsel" are not "employees." Indeed, everyone agrees that "special counsel" are independent contractors expressly defined as such in the parties' lengthy written contracts. Petitioners seek to review the Sixth Circuit Court of Appeals' rejection of their notion accepted by the U.S. District Court that the term "officer" must be extended to widely cover the State of Ohio's independent contractors.

The simple reality is that "special counsel" are not unique or special. They are private attorneys who engage in collection of consumer debts as part of their separately controlled businesses. The OAG selects these individuals from the marketplace. While the OAG is statutorily enabled to make the selection by virtue of Ohio statute, R.C. §109.08, "special counsel" remain what they are – independent contractors. When communicating with consumers regarding collection of consumer debts "special counsel" should receive no special dispensation from the FDCPA's wide-ranging remedial coverage.

The Sixth Circuit's recognition of the above reality does not conflict with the precedents of this Court or of any other Circuit Courts of Appeals. To the contrary and to the extent concepts of federalism, and Eleventh Amendment immunity could even be at stake, the decision is consistent with two decisions from the Ninth and Eleventh Circuits that thoughtfully addressed the issue.

Further, Petitioners oversell the jurisdictional "importance" of the federal question answered by the Sixth Circuit. The ruling involves activity that is generally localized to independent contractors engaged by the OAG in the State of Ohio. While it is doubtless that several million individuals received the types of offending communications at issue in this case, the actions of this isolated group of Ohio private attorneys does not warrant the sort of additional, exceptional, review generally reserved by this Court. More importantly, the federal question answered

below does not conflict with relevant decisions of this Court.

Finally, Petitioners seek to manufacture an issue for review based upon arguments that were never raised until Petitioners filed their losing request for re-hearing *en banc*. Therein and now, Petitioners seek to resolve a non-issue: whether practices that violate 15 U.S.C. §1692e are misleading to the "least sophisticated consumer" or to the "unsophisticated consumer." Based upon the precedential evolution of both standards, there is no appreciable difference between the two that requires resolution.

Accordingly, Petitioners' request for writ of certiorari should be DENIED.

STATEMENT OF THE CASE

A. Factual And Procedural Background

For the 2012 to 2013 contract year, the OAG engaged Mark Sheriff, an attorney with Wiles, Boyle, Burkholder & Bringardner Co., LPA ("Wiles"), as "special counsel" under R.C. §109.08. Pet. App. 25a.

In 2007, Mr. Sheriff's firm sued Respondent, Hazel Meadows, to recover a tuition debt owed to the University of Akron. Id. Ms. Meadows agreed in a judgment entry signed by her counsel to make monthly payments. Id. Ex. B, PageID#1083. She made timely payments thereafter. Doc. 60-1, S. Sheriff Aff., PageID#1077

In July 2012, Sarah Sheriff, a Wiles employee, claims that she fielded a call from Ms. Meadows "asking Sheriff for her balance." Id., PageID#1078. Ms. Sheriff sent a dunning letter dated July 20, 2012 seeking to collect the balance as stated. Pet. App. 17a. The letter was sent using the OAG's official letterhead stationery for his "Collections Enforcement Section." Id. Ms. Sheriff, a non-lawyer, signed the letter. The letter contained the additional notation under her signature: "Special Counsel to the Attorney General." Id.

Ms. Meadows asserted that she did not "recall ever asking anyone for any information about this matter." Doc. 48-3, Meadows Aff., PageID#612. The letter "scared her because she thought that the OAG might charge her with a crime for not paying what he said she owed." Id., PageID#613.

As with Sheriff, the OAG engaged Eric A. Jones as "special counsel" for the July 2011 to June 2012 contract year. Pet. App. 25a. On May 24, 2012, Jones sent Respondent, Pamela Gillie, a dunning letter on OAG letterhead stationery seeking to recover a university medical bill. Pet. App. 14a.

Ms. Gillie stated that when she first looked at the letter she believed that it came directly from the OAG and assumed that Mr. Jones must have been an attorney with the OAG's office. Doc. 48-1; P. Gillie Aff., Ex. A, PageID#608-610 at ¶¶ 5, 6. Only after thoroughly considering the letter did Ms. Gillie's suspicions take hold – that something didn't seem right. Ms. Gillie explained that she became greatly

confused as to who really sent the letter. Doc. 48-1; P. Gillie Aff., Ex. A, PageID#608-610 at ¶¶ 10-14. She even believed that because of the appearance of certain aspects of the letter including the payment return address and payment coupon, the letter could have been some sort of scam to scare her into paying money by someone pretending to be the OAG. Doc. 48-1; P. Gillie Aff., Ex. A, PageID#608-610 at ¶ 12.

On March 5, 2013, Respondents brought a class action against Mark Sheriff, Sarah Sheriff, and Wiles, and Jones and his firm. Respondents alleged, *inter alia*, that the use of the OAG's letterhead stationery by "special counsel" violated Respondents' consumer rights under various provisions of 15 U.S.C. §1692e including subsections (9) and (14). Doc. 1, Compl., PageID#16-19.

On August 12, 2014, the U.S. District Court granted the motions for summary judgment filed by Mark Sheriff, Sarah Sheriff, Wiles, Eric Jones and Mr. Jones' firm. Pet. App. 77a; App. C. Respondents appealed.

On May 8, 2015, the Sixth Circuit reversed. Pet. App. 18a; App. B.

On July 14, 2015, the Sixth Circuit denied Petitioners' request for rehearing *en banc*. Pet. App. 1a; App. A.

The instant Petition for a Writ of Certiorari ensued.

REASONS FOR DENYING THE WRIT

I. There Is No Reason For The Court To Review The Sixth Circuit's Determination That Independent Contractors Like "Special Counsel" Are Not "Officers" Within The Meaning Of 15 U.S.C. §1692a(6)(C) Under The Fair Debt Collections Practices Act ("FDCPA")

A. There Is No Conflict With This Court's Decisions.

1. Federalism Is Not At Issue

The Sixth Circuit's decision does not conflict with this Court's precedents, and does not involve issues of either federalism, or rejection of the "clear statement rule."

The Sixth Circuit correctly determined that "special counsel" are independent contractors who, "in truth, are indistinguishable from the myriad of independent contractors who enter into for-profit agreements with government agencies or actors to help fulfill the duties of some government office." Pet. App. 29a. Reviewing the Dictionary Act, Black's Law Dictionary, Ohio's own Revised Code definitions, available case law, as well as a supportive Ohio Ethics Commission's Advisory Opinion, the Sixth Circuit ultimately held that independent contractors like "special counsel" do not qualify as "officers" as that term is used in the FDCPA. Pet. App. 29a-40a and *Advisory Op.* No. 75-015.

Petitioners highlight their belief that Ohio's "sovereignty" is at the heart of this case by devoting the first 6 pages of their statement to explain the obvious, undisputed, and "goes without saying" fact that the States have historically placed high importance on the manner and priority associated with payment and collection of their debts. Pet. at 2-4.

One need not cite to the Magna Carta or to decisions from the Chancellor of the Exchequer to reinforce the seriousness of recovery of funds owed to the States. Respondents get it. How the State of Ohio collects its own debts is serious business.

While the State's collection of these consumer debts is serious to the State, the acts and practices associated with such collections are not so unique that they become constituent elements of the ether that makes up a State's sovereignty.

Petitioners believe that because history supports the "serious" nature of a sovereign's prerogative to collect the public's debts, the power to do so is transformed into a "sovereign power" – so much so that anyone with whom the sovereign contracts should realize the same sovereign immunity. This is an exaggeration.

Moreover, in the case of independent contractors who share undeniably strong similarities to "special counsel," this position has already been rejected by at least two other Circuit Courts of Appeals. *Rosario v. Am. Corrective Counseling Servs.*, 506 F.3d 1039 (11th Cir. 2007); *Del Campo v. Kennedy*, 517 F.3d 1070 (9th

Cir. 2008). The Sixth Circuit's decision is wholly consistent with these rulings.

Collection of debts is simply a proprietary right that can be exercised by most anyone or any entity. Pet. App. at 36a. Businesses, individuals and governments alike collect debts every single day. By contrast, not just anyone or any entity is authorized to tax, or to make or enforce laws to govern the public. Taxation and public law creation are the types of functions that truly represent core sovereign power. Id.

That the OAG does not completely reserve the State's proprietary right to collect the State's debts for his own office and employees but instead outsources the responsibility to "special counsel" is telling. A State government could not legitimately outsource the responsibilities to tax or to create public law to third parties and expect to retain sovereign power. Thus, the State's actions to direct collection of its consumer debts to independent contractors clearly underscores the mundane rather than sovereign nature of the rights exercised.

Bringing the analysis back to the FDCPA, Petitioners' argument stems from its desire to over-expand the definition of the term "officer" as it used in 15 U.S.C. §1692a(6)(C). Traditional canons of statutory interpretation hold that exemptions to broad remedial statutes are to be read narrowly. *C.I.R. v. Clark*, 489 U.S. 726 (1989), citing *Phillips v. Walling*, 324 U.S. 490 (1945). Thus, Petitioners'

argument for adoption of a broad definition of the term "officer" and/or for the inclusion of additional immunities (see infra) not expressed in the exemption provisions would be improper.

Respondents note that they have never argued that the FDCPA should be deemed to regulate the consumer debt collection activities of the OAG or of the State of Ohio. Respondents' case is calculated to address the behavior of private attorneys and private attorneys only. That the OAG directed these private attorneys to use his letterhead, and further, that these private attorneys actually followed the OAG's directive in contravention of the FDCPA is a matter between the OAG, the State of Ohio and the private attorneys.

Petitioners shout federalism because it is allegedly unclear to *them* that Congress chose not to exempt independent contractors. Yet the term "officer" was left undefined in the FDCPA. That the term was undefined does not automatically render the Congressional statement unclear or ambiguous. The "susceptibility of the word to alternative meanings 'does not render the word whenever it is used, ambiguous,' particularly where 'all but one of the meanings is ordinarily eliminated by context.'" *Carcieri v. Salazar*, 555 U.S. 379, 391 (2009), citing *Deal v. United States*, 508 U.S. 129, 131-32 (1993). If that were true, untold numbers of federal statutes containing common undefined terms that also coincidentally have some impact on the activities of States would be subject to invalidation. Such an overbroad

interpretation of the "clear statement rule" should be rejected.

2. The Sixth Circuit Did Not Reject The Clear Statement Rule

Based upon the tone of his appeal, the OAG obviously did not appreciate being told that his private debt collectors, selected from the marketplace, failed to meet the criteria to be defined as an "officer." This of course follows the irony that the OAG touts consumer protectionism as one of his main goals. Pet. at 35. In fact, the OAG contractually requires his "special counsel" independent contractors to abide by the FDCPA. Pet. at 34, citing Doc. 48-8, Contract, PageID#646. But, when confronted with Respondents' case, Petitioners complain that their actions are not covered by the FDCPA. Petitioners resort to calling the FDCPA an unclear intrusion into State sovereignty because they disliked the interpretation the Sixth Circuit provided for the undefined term "officer." They claim that Congress did not clearly articulate that activities of the State would be altered.

However, nothing contained in the appellate court's ruling is tantamount to a "rejection" of the "clear statement rule." To the contrary, the Sixth Circuit wholly acknowledged that "If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear

in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Pet. App. 38a.

The Sixth Circuit simply observed that Respondents' case did not involve questions concerning the regulation of Ohio or the structure of Ohio's government. Pet. App. 39a. Thus, it was unnecessary for the Sixth Circuit to directly respond to Petitioners' challenge that federalism and/or clarity of definition was at issue. It does not follow that the Sixth Circuit's holding implied that it chose not to follow or reject the clear statement rule. If pressed, Respondents believe that the Sixth Circuit would have easily concluded that the FDCPA was enacted to touch limited aspects of State governmental debt collection. Pet. App. 38a-44a.

Indeed, the FDCPA expressly mentions both Federal and State government activities in numerous places. One prominent example not previously discussed but which exposes the weakness of Petitioners' argument is found in section 1692n (which states):

> This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, **except to the extent that those laws are inconsistent with any provision of this subchapter**, and then only to the extent of the inconsistency. For the purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any

> consumer is greater than the protection provided by this subchapter.

15 U.S.C. §1692n (emphasis added).

This is the FDCPA section devoted to federal preemption. Like the FDCPA's exemption provisions, this provision is also clear and unambiguous. It speaks to preserving the balance of power between the State and Federal governments. In enacting the FDCPA, Congress preempted State law only to the extent such law would provide *less protection* than that offered by the FDCPA. In this regard, the FDCPA provided the floor for minimum consumer protection standards. *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 951 (9th Cir. 2011) ("Congress enacted the FDCPA expressly because prior laws for redressing 'abusive, deceptive, and unfair debt collection practices' were 'inadequate to protect consumers.' 15 U.S.C. §1692(a), (b). The statute preempts state laws 'to the extent that those laws are inconsistent with any provision of [the FDCPA].' 15 U.S.C. §1692n.").

Petitioners assert that private, "special counsel" independent contractors must be "officers" under Ohio law. Indeed, the OAG seeks to envelop "special counsel" under the "officer" mantle by executive fiat, a law no less impactful than a statute coming from Ohio's legislature. After all, there is no Ohio law that directly governs the actions of "special counsel," much less defines them as anything more than independent contractors. Allowing Petitioners' interpretation of

the OAG's authority in this regard to prevail would be inconsistent with the FDCPA's protections and must therefore be rejected. Even if the OAG could unilaterally manifest some definition of the term "officer" that would include "special counsel," such a pronouncement would be inconsistent with the FDCPA and thus ineffectual as a matter of federal preemption under §1692n.

Further, it is worth reiterating here that the FDCPA provides extremely broad coverage against debt collectors to protect consumers. *Frey v. Gangwish*, 970 F.2d 1516, 1521 (6th Cir. 1992). Notwithstanding Petitioners' arguments to the contrary, Congress did indeed provide a clear and unambiguous statement that limited immunities exist in favor of officers and employees of the United States or the States. 15 U.S.C. §1692a(6)(C). Nevertheless, to give full effect to the FDCPA's remedial nature these statutory exemptions must be construed narrowly. *C.I.R. v. Clark*, 489 U.S. 726 (1989), citing *Phillips v. Walling*, 324 U.S. 490 (1945). The Sixth Circuit Court of Appeals' invocation of that rule of statutory interpretation should not be viewed as abandonment of the clear statement rule.

3. Section 1983 Cases Are Inapposite

Petitioners further confuse matters by their efforts to analogize principles of "qualified immunity" sometimes available to defendants in 42 U.S.C. §1983 cases with the FDCPA's exemption for State "officers

or employees." Here however, Respondents sued for violations of the FDCPA in accordance with their private rights of action. They did not sue for relief under §1983 for deprivation of their constitutional rights. Thus, the §1983 case law cited by Petitioners is inapposite.

Nevertheless, Petitioners' notion that the Sixth Circuit's decision is somehow in conflict with this Court's decisions in *Filarsky v. Delia*, 132 S. Ct. 1657 (2012) and *Malley v. Briggs*, 475 U.S. 335 (1986) deserves appropriate retort. In short, to allow Petitioners' comparison to stand would render the express exemptions of 15 U.S.C. §1692a(6) superfluous.

Briggs and *Filarksy* both involved alleged deprivations of Fourth and Fourteenth Amendment rights. *Briggs* involved a false arrest by a police officer based upon the officer's acquisition of an implausible arrest warrant. *Briggs*, 475 U.S. at 338. *Filarsky* involved a firefighter's suit against city officials and a private attorney for allegedly conducting an arguably wrongful internal affairs investigation leading to a warrantless search. *Filarsky*, 132 S. Ct. at 1661.

Relevant here, the actor at issue in *Briggs* was an actual employee of the city while the actor in *Filarsky* was a private attorney hired by the city to conduct the internal affairs investigation. Because §1983 did not expressly deal with the immunity for certain government actors, the law evolved to consider immunity in such cases based upon common law. *Filarsky*, 132 S. Ct. at 1660. Ultimately, qualified

immunity under §1983 was extended in both cases to both individuals.

Citing these two inapposite decisions as support, Petitioners posit that the common law surrounding governmental immunities in §1983 must be available to all government actors under the FDCPA – this in spite of the fact that the FDCPA, unlike §1983, already contains specific self-contained exemptions. 15 U.S.C. §1692a(6). Subsection (C) speaks directly to the issue of government actor immunity. 15 U.S.C. §1692a(6)(C). As held by the Sixth Circuit, rules of statutory construction require such a finding. Pet. App. at 52a ("Qualified immunity is inapplicable to an action brought under the FDCPA where Congress has included an explicit exemption from debt collector liability for government officials. Cf. *Andrus v. Glove Construction Co.*, 446 U.S. 608 (1980)."). Id.

On this point, Respondents must wag the finger at Petitioners' inability to succumb to the temptation to beg an answer to the question: why is it that under §1983, an independent contractor who is said to act under "color of law" sometimes gets qualified immunity when a similar independent contractor cannot receive similar immunity for misconduct under other federal statutes like the FDCPA?

The answer is Congress interceded in the FDCPA where it did not in §1983. There are no express exceptions set forth in §1983, a law that has been on the books for over 100 years. Thus, the courts have historically relied upon application of the common

law of immunities as they existed at the time of the statute's inception. *Filarsky*, 132 S. Ct. at 1662.

By contrast, the FDCPA's immunity provisions are fully expressed in a specific exemption provision. Petitioners now ask the Court to incorporate §1983's common law immunity analysis into the FDCPA but to do so would render the express FDCPA immunity provisions superfluous in further violation of settled rules of statutory construction. *Corley v. United States*, 556 U.S. 303, 314 (2009) ("a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. "), citing *Hibbs v. Winn*, 542 U.S. 88 (2004). If common law immunities rule, governmental officers and employees are already absorbed, making the FDCPA exclusion unnecessary. This simply cannot be under the rule against antisuperfluousness.

Rejecting Petitioners' conclusion is also consistent with the language contained in *Filarsky*. Justice Roberts stated:

> We read § 1983 "in harmony with general principles of tort immunities and defenses." *Imbler*, 424 U.S., at 418, 96 S. Ct. 984, 47 L. Ed. 2d 128. And we "proceed on the assumption that common-law principles of immunity were incorporated into our judicial system and that **they should not be abrogated absent clear legislative intent to do so.**" *Pulliam v. Allen*, 466 U.S. 522, 529, 104 S. Ct. 1970, 80 L. Ed. 2d 565 (1984).

Filarsky, 132 S. Ct. at 671-72 (emphasis added). Thus, even if Petitioners' argument were remotely plausible, the self-contained FDCPA exemptions signify Congress' clear intent to provide only very narrow immunity for properly defined officers or employees of the State.

It is worth mentioning here that the holding in *Filarsky* also comes with a proviso. In her concurring opinion in *Filarsky*, Justice Ginsburg reminds us that qualified immunity may be overcome "if the defendant knew or should have known that his conduct violated a right 'clearly established' at the time of the episode in suit." *Filarsky*, 132 S. Ct. at 1668. Assuming again that some additional immunities exist *vis a vis* §1983 as Petitioners urge, it is impossible to imagine how qualified immunity could ever exist in this case.

Even though they are independent contractors, "special counsel" may very well act under "color of state law" for §1983 purposes. Yet, they are also experienced collection lawyers who are contractually obliged to know and abide by the FDCPA. Using a name other than one's true name on consumer debt collection communications plainly violates a consumer's clearly established rights under 15 U.S.C. §1692e(14). While the OAG may have directed "special counsel" to prominently use the OAG's name and seal on all debt collection communications, "special counsel" should have known that such conduct would violate the FDCPA. Even under *Filarksy*, "special counsel" would have no immunity.

Based upon the foregoing, the lower court's decision is not in conflict with this Court's precedents involving interpretation of §1983 cases including *Briggs* and *Filarsky*.

B. The Sixth Circuit's Decision Does Not Conflict With Decisions From Other Circuit Courts Of Appeals – *Heredia v. Green* Is Inapposite

In their quest to find some conflict in other circuit court decisions, Petitioners trot out the aged case of *Heredia v. Green*, 667 F.2d 392 (3rd Cir. 1982). Pet. at 21-23. Petitioners label *Heredia* as "analogous" while they simultaneously criticize the truly analogous decisions of *Pollice v. National Tax Funding L.P. et al.*, 225 F.3d 379 (3rd Cir. 2000) and *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260 (9th Cir. 1996). Petitioners describe *Pollice* and *Brannan* as "far-afield" because ownership of the government debts were transferred and "involved debt collection for *private parties.*" Pet. at 23.

At best, Petitioners' arguments are baffling. At worst, they are specious.

1. In 1982, the Third Circuit Court of Appeals in *Heredia* considered the activities of a court appointed, Landlord and Tenant Officer of the Philadelphia Municipal Court. The court position was created to cut down on the deluge of eviction proceedings that resulted from a case that overturned existing *ex parte*

eviction processes. The L&T officer position was thus created and charged with issuing required eviction notices which also include defaulted rent balances due from private landlords and private tenants. *Heredia*, 667 F.2d at 395. Unlike the debts here, the debts at issue in *Heredia* were *never* owed to a governmental entity. They were always owed to *private* landlords.

Thus, under Petitioners' own test for determining whether a case is "far-afield" (collection for private parties), *Heredia* fits that bill more so than either *Brannan* or *Pollice*. More importantly, *Heredia* is purely distinguishable because the L&T officer was not an independent contractor like "special counsel." Pet. App. 38a at fn. 10. Indeed, the L&T officer occupied an office at the courthouse and his conduct to issue the notices and to charge the fees questioned in the case were strongly regulated by the President Judge who appointed him. *Id. Heredia* is clearly inapposite for those reasons.

2. *Pollice* also came from the Third Circuit Court of Appeals and also considered the 15 U.S.C. §1692a(6)(C) exemption. Even though its prior opinion could have offered some academic comparison as to the issue, the panel in *Pollice* did not even mention *Heredia*. We are left to speculate why, but the strong language contained in Judge Gibbons' dissenting

opinion in *Heredia* offers the best starting point. *Heredia*, 667 F.2d at 397

In *Pollice*, aging City of Pittsburgh debts for water and sewer charges were sold after default to a private company. But, the City retained certain rights over servicing of the claims. The City entered into a servicing contract with Capital Asset Research Corp., Ltd. ("CARC") to collect these government bills. *Pollice*, 225 F.3d at 386. CARC attempted to collect certain questionable rates of interest and penalties added to the debt balances. CARC's collection attempts were challenged by numerous consumers upon various legal theories including the FDCPA. Finding that the CARC collectors were not officers or employees exempt under §1692a(6)(C), the panel adopted the reasoning of *Brannan* and held that the "exemption does not extend to those who are merely in a contractual relationship with the government." *Pollice*, 225 F.3d at 406. Quoting *Brannan* the court stated: "This exemption applies only to an individual government official or employee who collects debts as part of government employment responsibilities. USA Funds is a private nonprofit organization with a government contract; it is not a government agency." *Id.*

Contrary to Petitioners' assertion, the facts of *Pollice* did not involve collection

of debts for private parties. The City retained the debt-servicing rights and entered into a servicing contract with the debt collector. The same, of course, cannot be said of the L&T officer in *Heredia*.

3. *Brannan* involved a guaranteed government student loan. The private guaranty agency, USA Funds, was governed by the Higher Education Act of 20 U.S.C. §1071 et seq. After paying off the defaulted loan pursuant to its guaranty, USA Funds began collection efforts against the borrower. Eventually, the borrower sued USA Funds for violating several sections of the FDCPA. USA Funds claimed something it referred to as a "government actor" exemption and the District Court agreed. On appeal, the Ninth Circuit Court of Appeals reversed noting that where a federal statute names the parties which come within its provisions (e.g. an "officer" or "employee"), other unnamed parties are excluded. *Brannan*, 94 F.3d at 1266; citing *Foxgord v. Hischemoeller*, 820 F.2d 1030 (9th Cir. 1987). USA Funds was not a government entity, it was a private company with a "government contract."

   Like USA Funds, "special counsel" disclaimed any agency relationship with the OAG and were defined in the parties' written contracts as independent contractors. "Special counsel" are private individuals with government contracts

> who have no agency relationship with the State.

Based upon these reasons, *Heredia* cannot be viewed as analogous or apposite to the Sixth Circuit's decision.

Respondents know of no other conflicts on this issue existing in other jurisdictions. Indeed, the Sixth Circuit's decision is consistent with the reasoning of the Circuit Courts of Appeals decisions of *Pollice* and *Brannan*, and the U.S. District Court decisions of *Piper v. Portnoff Law Assocs.*, 274 F. Supp. 2d 681 (E.D. Pa. 2003); *Gradisher v. Check Enforcement Unit, Inc.*, 133 F. Supp. 2d 988 (W.D. Mich. 2001); and *Knight v. Schulman*, 102 F. Supp. 2d 867 (S.D. Ohio 1999).

II. There Is No Reason For The Court To Reconsider The Sixth Circuit's Determination That "Special Counsel's" Use Of The Ohio Attorney General ("OAG") Letterhead Stationery To Collect Consumer Debts Could Materially Mislead The Least Sophisticated Consumer In Violation Of 15 U.S.C. §1692e(9) And (14).

Petitioners' final arguments turn to the issue of whether the collection practices in this case were misleading under 15 U.S.C. §1692e. Pet. at 23-28. Petitioners urge this Court to take up the case to resolve an alleged conflict with the other Circuit Courts of Appeals over the controlling standard to

determine whether a representation or practice under the FDCPA is misleading. Should representations made in communications be measured by reference to the "least sophisticated consumer" or to the "unsophisticated consumer"? Pet. at 23-28.

Petitioners never raised this particular issue during the 2 and 1/2 year period prior to the filing of their losing request for rehearing *en banc*. Moreover, this dichotomy was not before the Sixth Circuit and was never discussed in the Sixth Circuit's ruling. Petitioners now remarkably claim that it is an important, broadly recurrent issue and that this case only "deepens the divide." Pet. at 28. It is not and it does not.

Notwithstanding Petitioners' failure to raise the issue, no meaningful conflict exists for determination. As noted in the recent case of *Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98 (1st Cir. 2014):

> A majority of the circuits applies a "least sophisticated consumer" standard. See, e.g., *Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 509 (6th Cir. 2007); *Terran v. Kaplan*, 109 F.3d 1428, 1431-32 (9th Cir. 1997); *Russell v. Equifax A.R.S.*, 74 F.3d 30, 34 (2d Cir. 1996); cf. *Chiang v. Verizon New Eng. Inc.*, 595 F.3d 26, 42 (1st Cir. 2010) (referencing, though having no occasion to adopt or apply, the least sophisticated consumer standard). Labels aside, there appears to be little difference between this formulation and the "unsophisticated consumer" formulation.

> See *Avila v. Rubin*, 84 F.3d 222, 227 (7th Cir. 1996) ("[T]he unsophisticated consumer standard is a distinction without much of a practical difference in application."). We adopt the unsophisticated consumer formulation to avoid any appearance of wedding the standard to the "very last rung on the sophistication ladder." *Gammon v. GC Servs. Ltd. P'Ship*, 27 F.3d 1254, 1257 (7th Cir. 1994).

Pollard, 766 F.3d at 103, n.4.

Furthermore, the Sixth Circuit has consistently imposed a materiality element into its FDCPA analysis. It did so in this case even though Respondents argued that materiality should have been presumed for *per se* violations under §§1692e(9) and (14). Pet. App. at 47a; citing *Wallace v. Washington Mutual Bank, F.A.*, 683 F.3d 323, 326-27 (6th Cir. 2012). Thus, even in these circumstances, the Sixth Circuit ruled that it is not enough to establish that an offending communication is factually consistent with the specific prohibitions described under such subsections (e.g., distributing a communication that simulates an official State document; and/or using an organization name other the true name of the debt collector's business) – both of which occurred here. In order to fully prove that a representation or practice violates 15 U.S.C. §1692e, including communications at issue under subsections (9) and (14), a consumer must further demonstrate that the questioned practice or representations contained in such communications

have "the tendency to confuse the least sophisticated consumer." Id.

Moreover, over many years since the FDCPA's inception, the Sixth Circuit and many other jurisdictions clarified the meaning behind the "least sophisticated consumer" standard. The court explained that the FDCPA was designed to protect all consumers, including those who are gullible, or naïve. *Kistner v. Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433, 438 (6th Cir. 2008). While consistently stating that the bar is set low, the Sixth Circuit and many others have injected qualifying factors into the analysis to eschew scenarios for "bizarre or idiosyncratic interpretations" of collection notices. *Barany-Snyder v. Weiner*, 539 F.3d 327, 333 (6th Cir. 2004). Indeed, the Sixth Circuit has further ruled that the least sophisticated consumers are presumed to have read the entirety of a collection notice with a basic level of understanding and care. *Kistner*, 518 F.3d at 438-39.

With these additional qualifications, the "least sophisticated consumer" and the "unsophisticated consumer" are largely the same person. Accordingly, the idea that a conflict exists between the two standards is without merit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be DENIED.

Respectfully submitted,

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In the Supreme Court of the United States

MARK J. SHERIFF, SARAH SHERIFF, WILES, BOYLE, BURKHOLDER & BRINGARDNER CO., LPA, AND MICHAEL DEWINE, ATTORNEY GENERAL OF OHIO,

Petitioners,

v.

PAMELA GILLIE AND HAZEL MEADOWS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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With this alleged class action under the Fair Debt Collection Practices Act ("Act"), Plaintiffs Pamela Gillie and Hazel Meadows seek to impose substantial liability on special counsel for the Ohio Attorney General. They do so merely because special counsel used Attorney General letterhead to show that they acted on behalf of the Attorney General when collecting debts owed to Ohio—as the Attorney General's Office has long *required* them to do. Over dissents at the en banc and panel stages, the Sixth Circuit reinstated Plaintiffs' suit. It held (1) that special counsel do not meet the Act's exemption for state "officers" under 15 U.S.C. § 1692a(6)(C), and (2) that a jury could find their use of state letterhead "misleading" under 15 U.S.C. § 1692e. Pet. App. 28a-54a.

As the Petition detailed (at 15-35), both holdings warrant review. *First*, the Sixth Circuit's broad rule that independent contractors cannot be state "officers" conflicts with the Court's clear-statement cases, with its cases interpreting 42 U.S.C. § 1983, and with the most analogous circuit case. *Second*, the Sixth Circuit's holding that a jury could find special counsel's use of state letterhead misleading exacerbates an existing circuit disagreement. *Third*, these issues are important, and the Sixth Circuit resolved them in a way that undermines federalism, that unfairly leaves debt collectors in the dark on the Act's liability standards, and that does not even further the Act's consumer-protection purposes.

In response, Plaintiffs argue initially that these issues are unimportant and then that the decision below comports with relevant cases from this Court and from the circuit courts. They are mistaken.

I. PLAINTIFFS FAIL TO MINIMIZE THE IMPORTANCE OF THE QUESTIONS PRESENTED

As the Petition illustrated, the Court should grant review because the two questions presented are important. Pet. 29-35. The Sixth Circuit's decision "trench[es] on [Ohio's] arrangements for conducting" a sovereign duty. *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004). And the decision implicates all of the reasons why this Court routinely "correct[s] lower courts when they wrongly subject individual officers to liability." *City and Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015); *Filarsky v. Delia*, 132 S. Ct. 1657, 1665-67 (2012). Plaintiffs say nothing to alleviate these concerns.

A. While conceding that Ohio's debt collection "is serious business" (Opp. 8), Plaintiffs nevertheless argue that this case has no federalism implications because they sued special counsel. That is mistaken for both questions presented.

Starting with the first question, Plaintiffs suggest that the Sixth Circuit's holding does not undermine federalism *both* because they sued independent contractors chosen "from the marketplace" *and* because those contractors undertake the mundane task of collecting debts. Opp. 2-3, 8-9. They are doubly wrong.

Filarsky shows that federalism concerns can arise from suits against contractors. The *Filarsky* plaintiff could just as easily claimed that the government had chosen a lawyer from the marketplace to handle an employment matter—like any business might. *See* 132 S. Ct. at 1660-61. But this Court recognized that the concerns with imposing liability on state employees extended to contractors performing state func-

tions. *Id.* at 1665-67 That concern is magnified here; special counsel have served the Attorney General since the creation of that office. *See* Pet. 4-6.

Plaintiffs also wrongly suggest that debt collection does not involve a sovereign act. As the Petition noted (at 1-4), States have long viewed their debt-collection prerogatives as aspects of their sovereignty. While Plaintiffs ridicule the Petition's reliance on some older authorities (Opp. 8), they nowhere challenge a central principle from those authorities—that the clear-statement rule may have *originated* in this very public-debt context. *See Anon.*, 1 Atk. 262, 262, 26 Eng. Rep. 167, 167 (Ch. 1745).

Turning to the second question, Plaintiffs suggest that their fraud allegations challenge *only* decisions by private parties. Opp. 2, 10. Yet those claims attack the methods the *State* has chosen to collect debts. After all, it was the General Assembly that required special counsel to use state letterhead for tax debts, Ohio Rev. Code § 109.08, and the Attorney General who extended that directive to all public debts, Doc.24, Answer, PageID#292. So Plaintiffs put *Ohio* to the choice between restructuring its "arrangements for conducting" debt collection or permitting special counsel to face perpetual liability. *Nixon*, 541 U.S. at 140.

In their federalism discussion, Plaintiffs also suggest that special counsel seek "sovereign immunity." Opp. 8-9. Not so. The Petition raises statutory, not constitutional, questions. Thus, Plaintiffs' cited cases holding that the Constitution did not grant sovereign immunity to certain entities offer no guidance about the meaning of "officer" in § 1692a(6)(C) or of "misleading" in § 1692e.

B. Apart from federalism, Plaintiffs find "irony" in the Attorney General "tout[ing] consumer protectionism" while arguing that the Act does not reach special counsel's use of state letterhead. Opp. 11. There is nothing "ironic" about the need to balance consumer protection and fair collection. The Act itself recognizes the need to *both* eliminate abusive practices *and* protect "debt collectors who refrain from using" them. 15 U.S.C. § 1692(e).

In that respect, Plaintiffs ignore the Petition's reasons why the Sixth Circuit's decision disserves *both* goals. Pet. 30-35. As for consumer protection, the Sixth Circuit's directive that special counsel use private letterhead could lead debtors to "assume that the letter does *not* concern a state debt." Pet. App. 9a (Sutton, J., dissenting). This could be problematic because state law prioritizes state debts. Pet. 32-33. Further, state letterhead shows special counsel's connection to the Attorney General's Office; debtors who do not know that connection might not know to report abuse. As for conscientious debt collectors, the Sixth Circuit's decision could expose special counsel to "liability coming and going" if a plaintiff found private letterhead misleading. Pet. App. 9a (Sutton, J., dissenting). And because the Act authorizes damages and attorney's fees without proof of injury, a lower court's legal errors about the Act's scope are especially in need of correction. *Cf. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 617-18 (2010) (Kennedy, J., dissenting).

C. Plaintiffs lastly suggest that the questions presented are unimportant because they "involve[] activity that is generally localized to" special counsel. Opp. 3. Yet the multi-state *amicus* brief shows the

broader concern with the way in which the Sixth Circuit approached this case. And, as the sheer number of circuit decisions shows, there has been a "'proliferation of litigation'" under the least-sophisticated-consumer standard. *Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 513 (6th Cir. 2007) (citation omitted). Regardless, Plaintiffs themselves allege that "several *million* individuals received the types of" letters that they challenge in this case. *Id.* (emphasis added). Plaintiffs' own measure of the stakes fully justifies the Court's intervention.

II. PLAINTIFFS CANNOT RECONCILE THE SIXTH CIRCUIT'S HOLDING THAT SPECIAL COUNSEL ARE NOT "OFFICERS" WITH THE CASELAW

The Sixth Circuit's holding that special counsel are not state "officers" under § 1692a(6)(C) conflicts with (1) the Court's clear-statement cases, (2) its § 1983 cases, and (3) *Heredia v. Green*, 667 F.2d 392 (3d Cir. 1981). Plaintiffs' responses fail.

A. Plaintiffs Fail To Reconcile The Decision Below With The Clear-Statement Rule

As the Petition showed (at 15-18), the Sixth Circuit's holding conflicts with this Court's cases construing federal law not to intrude on important state interests unless Congress speaks *clearly*. *Bond v. United States*, 134 S. Ct. 2077, 2088-89 (2014); *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). Plaintiffs' efforts to avoid these cases lack merit.

First, Plaintiffs argue that the clear-statement cases do not apply because the Act's exemption *unambiguously* excludes independent contractors. Opp. 7, 13. Yet Plaintiffs do not even cite the relevant definition of "officer"—"any person authorized by law to

perform the duties of the office." 1 U.S.C. § 1. As the Petition noted (at 15), that definition covers special counsel—who, like assistant attorneys general, fall within the unclassified civil service of the State—because Ohio law gives the Attorney General the *duty* to collect debts and *authorizes* special counsel to represent the State in this duty. Ohio Rev. Code §§ 109.08, 124.11(A)(11), 131.02. Further, Plaintiffs themselves asserted below that "'[t]he term "officer" is ambiguous' and 'open to multiple, yet reasonable interpretations.'" Pet. App. 60a (Sutton, J., dissenting) (citation omitted). Now recognizing that the clear-statement rule requires the Court to read this ambiguity in the State's favor, Plaintiffs say the term is unambiguous. This about-face speaks volumes about whether the definition unambiguously excludes special counsel.

Second, Plaintiffs fall back on the Sixth Circuit's holding that the clear-statement cases do not apply because this suit does "not involve questions concerning the regulation of Ohio or the structure of Ohio's government." Opp. 12. They ignore the reasons why that holding is inaccurate and irrelevant. Pet. 16-18. It is inaccurate because this case challenges how the State engages in a sovereign act. *Nixon*, 541 U.S. at 140. It is irrelevant because this Court applies the clear-statement rule to more than just laws regulating States. *Bond*, 134 S. Ct. at 2081.

Third, Plaintiffs invoke a competing canon—"that exemptions to broad remedial statutes are to be read narrowly." Opp. 9-10, 14. But "that canon does not trump the *Gregory* clear-statement rule because *Gregory* itself involved a remedial statute, the Age Discrimination in Employment Act." Pet. App. 60a

(Sutton, J., dissenting). Like *Gregory*, other cases have relied on the clear-statement rule for statutes that might be called "remedial." *Sossamon v. Texas*, 131 S. Ct. 1651, 1661 (2011) (Religious Land Use and Institutionalized Persons Act); *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) (Education of the Handicapped Act). This is unsurprising because the remedial-statute canon has been roundly criticized, *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* §§ 63-64 (2012), whereas the clear-statement rule has roots in the Constitution, *Gregory*, 501 U.S. at 457-61.

Fourth, Plaintiffs cite the Act's preemption provision. Opp. 12-13 (quoting 15 U.S.C. § 1692n). They fail to explain how it sheds light on the meaning of "officer." If Plaintiffs are arguing that a preemption provision renders the clear-statement rule inoperable, this Court's cases say otherwise. *Nixon*, 541 U.S. at 140-41 (invoking clear-statement rule for preemption provision); *Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 437-39 (2002) (same).

B. Plaintiffs Ignore The Key Insight From This Court's § 1983 Cases

The Petition illustrated that the Sixth Circuit's decision conflicted with this Court's § 1983 cases, which show that there is nothing unusual about federal law treating some independent contractors as "officers." Pet. 18-21.

Plaintiffs respond that this Court's § 1983 cases established immunities in a "common law" fashion because § 1983 contains *no* immunities, whereas the Act "contains specific self-contained exemptions" and so is not open to this common-law approach. Opp.

15-18. They miss the point of this analogy. The Petition did not seek to incorporate § 1983's immunities into the Act; it sought to deduce the meaning of the Act's "officer" exception. On that question, the § 1983 cases show that courts have viewed contractors as "officers" when they performed government functions. *Filarsky*, 132 S. Ct. at 1662-65.

Plaintiffs' argument also gets things backward. That the clear-statement rule led the Court to adopt § 1983's immunities even though the "statute on its face does not provide for *any* immunities" offers powerful support for special counsel. *Malley v. Briggs*, 475 U.S. 335, 342 (1986). If a statute devoid of immunities can be construed to afford immunities to contractors performing government duties, a statute's generous exception can be read to extend to those parties. Plaintiffs, by contrast, suggest that if Congress intended to incorporate *more* exemptions into the Act, it would have included *fewer*.

C. Plaintiffs Fail To Distinguish *Heredia*

As the Petition detailed (at 21-23), the Third Circuit in *Heredia*, "the only circuit to confront an analogous" situation, has rejected the Sixth Circuit's approach. Pet. App. 69a (Sutton, J., dissenting). Plaintiffs mistakenly distinguish *Heredia* while invoking cases that do not share its concerns. Opp. 19-23.

1. Plaintiffs cite three facts to distinguish *Heredia*. Opp. 20. None suffices.

Fact One: Plaintiffs say the debts in *Heredia* were owed to private landlords, not the State. Opp. 20. Far from reconciling *Heredia*, this confirms the conflict. It makes no sense to read § 1692a(6)(C) as exempting individuals collecting debts owed to *pri-*

vate parties, but not individuals collecting debts owed to *the government*.

Fact Two: Plaintiffs say that Landlord and Tenant Officers were not independent contractors. Opp. 20. Yet they point to nothing in *Heredia* suggesting that it turned on the officers' employment status. *See* 667 F.2d at 393. And Plaintiffs ignore the evidence suggesting that Landlord and Tenant Officers may have been independent contractors; the constables that they replaced had been so. *In re Act 147 of 1990*, 598 A.2d 985, 986 (Pa. 1991).

Fact Three: Plaintiffs say that the Landlord and Tenant Officers' conduct in sending the letters was "strongly regulated" by the *President Judge*. Opp. 20. Yet special counsel also used state letterhead at the directive of the *Attorney General*. Pet. App. 24a.

In sum, if the Act excludes special counsel authorized to collect *state* debts by *state law*, it also must exclude Landlord and Tenant Officers authorized to collect *private* debts by an *official's order*.

2. Plaintiffs argue that the Sixth Circuit's decision follows from *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379 (3d Cir. 2000), and *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260 (9th Cir. 1996). Opp. 20-23. That is mistaken.

As a specific matter, Plaintiffs dispute the Petition's claim that *Pollice* involved debt collection for *private parties*. Opp. 21-22. Yet *Pollice* expressly noted that the "government entities [there] decided to sell the claims" to a private party. 225 F.3d at 385. Plaintiffs also make much of the government entities' retention of *servicing* rights for the debts. Opp. 21-22. But the sale of the debts "eliminat[ed]

the possibility that the collector was somehow an officer of the government in collecting the debt *for the government*." Pet. App. 60a (Sutton, J., dissenting). Turning to *Brannan*, Plaintiffs argue that special counsel are similar to the private guaranty agency collecting on student loans. Opp. 22-23. They likewise ignore that, in *Brannan*, "the collector and not the government owned the debt in the first place." Pet. App. 60a (Sutton, J., dissenting).

More broadly, unlike special counsel who are authorized by state law to undertake an official duty of the Attorney General's Office, the guaranty agency in *Brannan* and the servicer in *Pollice* failed to identify any law that made debt collection a duty of some government office and that authorized those entities to undertake that duty for the office. Simply because special counsel here are officers does not mean that *all* independent contractors will be. Many will not meet the statutory requirements for "officer" status.

III. Plaintiffs Ignore The Circuit Disagreements Over How To Determine Whether A Statement Is Materially Misleading

As the Petition lastly explained (23-28), the Court should review whether special counsel's use of state letterhead was a "false, deceptive, or misleading representation" under 15 U.S.C. § 1692e. This Court's lack of guidance on § 1692e has led circuit courts to adopt conflicting tests for assessing whether debtors would find a statement misleading: the "least sophisticated consumer" test and the "unsophisticated consumer" test. While some courts have questioned how much room separates these tests, the circuit courts have applied them in ways that illustrate concrete disagreement. Plaintiffs' responses lack merit.

First, Plaintiffs assert that the failure to raise this issue until the *en banc* stage at the Sixth Circuit shows its lack of importance. Opp. 24. Yet the Sixth Circuit had previously picked sides in the debate. *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 400 (6th Cir. 1998) (adopting least-sophisticated-consumer test). So the *en banc* stage was the *earliest* opportunity to raise the issue. *See Cooper v. MRM Inv. Co.*, 367 F.3d 493, 507 (6th Cir. 2004); *cf. Medimmune v. Genetech, Inc.*, 549 U.S. 118, 125 (2007) (failing to raise issue more fully below "merely reflect[ed] counsel's sound assessment that the argument would be futile" at the circuit level).

Second, Plaintiffs quote from a decision suggesting that "'there appears to be little difference between'" these tests. Opp. 24 (quoting *Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98, 103 n.4 (1st Cir. 2014)). Yet they ignore the Petition's explanation why, in practice, real disagreement exists. Pet. 25-28. They, for example, nowhere reconcile the Seventh Circuit's view that a plaintiff must prove—generally through a consumer survey—that a representation would mislead "'a significant fraction of the population,'" *Durkin v. Equifax Check Servs., Inc.*, 406 F.3d 410, 415 (7th Cir. 2005) (citation omitted), with the other circuits' objective approaches tied solely to judicial review of a communication's four corners, *Russell v. Equifax A.R.S.*, 74 F.3d 30, 33-36 (2d Cir. 1996). Nor do Plaintiffs confront the circuit debate about when letterhead could confuse a debtor—notwithstanding clarifications below that letterhead. *Compare Lesher v. Law Offices of Mitchell N. Kay, PC*, 650 F.3d 993, 997-1003 (3d Cir. 2011); *Gonzalez v. Kay*, 577 F.3d 600, 604-07 (5th Cir. 2009); *with Lesher*, 650 F.3d at 1004-07 (Jordan, J., dissent-

ing); *Gonzalez*, 577 F.3d at 607-09 (Jolly, J., dissenting); *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360, 365 (2d Cir. 2005). The vigorous debate in the decision below added to this disagreement.

At day's end, the Sixth Circuit's decision itself best illustrates the need for the Court's guidance on what qualifies as a materially misleading communication. As the en banc dissent noted: "How these letters could be misleading is beyond me." Pet. App. 8a (Sutton, J., dissenting). That court's opaque misleading standards risk "align[ing] the judicial system with those who would use litigation to enrich themselves at the expense of attorneys who strictly follow and adhere to professional and ethical standards." *Jerman*, 559 U.S. at 612 (Kennedy, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

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In the Supreme Court of the United States

MARK J. SHERIFF, SARAH SHERIFF, WILES BOYLE, BURKHOLDER & BRINGARDNER CO., LPA, AND MICHAEL DEWINE, ATTORNEY GENERAL OF OHIO,
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v.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND 7 OTHER STATES IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the Dictionary Act's definition of "officer" unambiguously exclude all private contractors, such that the special counsel appointed by Ohio's Attorney General to undertake his duty to collect debts owed to the State are not state "officers" for purposes of the Fair Debt Collection Practices Act?

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Rules

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INTEREST OF *AMICI CURIAE*[1]

The Constitution itself establishes our dual system of government, which divides power "between the National Government and the States." *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011). This federalism is important because dividing governmental power "secures the freedom of the individual" as part of our constitutional system of "checks and balances." *Id.* at 2364–65. Federal intrusion into state sovereignty is thus of paramount concern for States and State Attorneys General.

Part of the liberty protected by federalism is the freedom of citizens to define "the structure of [State] government [ ] and the character of those who exercise government authority." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). This sovereignty allows States to carry out their core functions with pragmatism and flexibility. The Sixth Circuit's overly narrow interpretation of the Dictionary Act's definition of "officer" violates an important canon designed to preserve federalism: the clear-statement rule. This canon protects against the erosion of state authority—and the concomitant dilution of each individual's ability to influence public policy—without a clear congressional directive. Because the Act's definition of "officer" does not plainly exclude private contractors who are carrying out state sovereign duties under the authority of state statute, the decision below encroaches on States' flexibility to determine how to best govern themselves and thus warrants review.

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[1] Consistent with Rule 37.2(a), the *amici* States provided notice to the parties' attorneys more than ten days in advance of filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

When this Court was deciding *Gregory*, thirteen states signed on to an *amicus* that supported the clear-statement rule. Brief for Colorado & Florida et al. as *Amici Curiae* Supporting Respondent, *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991) (No. 90-50). Those States were concerned about maintaining a proper federal-state balance. This Court agreed, justifying the rule on that very basis. *Gregory*, 501 U.S. at 460.

That same principle is at stake here. The Fair Debt Collection Practices Act (FDCPA) relies on the Dictionary Act definition of "officer," defined as "any person authorized by law to perform the duties of the office." 1 U.S.C. § 1 (2012). This definition encompasses the special counsel that Ohio's Attorney General appoints to assist in debt collection. These special counsel are not *mere* independent contractors. By virtue of the Ohio statute that authorizes their hire and the duties they perform, they stand in the shoes of the Ohio Attorney General for debt-collection purposes. The opinion below, which nonetheless holds that they are not officers who wield any sovereign power, Pet. App. 43a, violates the clear-statement rule and limits States' authority to decide whether and on what terms they hire private contractors to assist them their sovereign duties.

Private contractors serve States in various capacities. To be sure, not every private contractor is an officer, and not every private contractor is "authorized by law." And as Judge Sutton noted in dissent, "sovereign power remains a precondition of officer status." Pet. App. 62a. So, irrespective of the

importance of their work, no one presumes building-maintenance or road-construction workers are standing in the shoes of a state official. But where the "authorization" and "duty" conditions are met, States are entitled to exercise their sovereign power to implement solutions through independent contractors—and to benefit from those contractors having state-officer status. This is true whether in debt collection or in other areas where federal statutes use the Dictionary Act definition of "officer."

The opinion below also undermines the authority of State Attorneys General. They must have the flexibility to delegate their powers to outside counsel and duly designated deputies. And they are entitled to applicable exemptions such as the state-officer exemption under the FDCPA.

The FDCPA's state-officer exemption serves as a critical tool for States as they respond to increasingly complex tax structures and fiscal challenges. A number of States use private contractors to collect debts, and a number of State Attorneys General appoint special counsel for this purpose. Because Congress has not spoken clearly in the FDCPA to cover States, they are entitled to structure their debt-collection activities so their private contractors qualify as "officers." States have the sovereign right to determine if and how they will collect the debts owed to them. Pet. App. 55a.

This Court should grant the petition and review whether private contractors qualify as state "officers" under 15 U.S.C. § 1692a(6)(C).

ARGUMENT

I. Courts should not interpret statutes as altering the federalism balance unless Congress expressly states that intent.

Federalism arises from the Constitution itself. "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory*, 501 U.S. at 457 The Constitution balances the power between these two sovereignties, reserving to the States or to the people all powers the Federal Compact has not delegated to the United States. U.S. Const. amend. X. Justice Story described the Tenth Amendment as "a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities." 3 J. Story, Commentaries on the Constitution of the United States 752 (1833).

Federalism exists to protect and promote individual liberty. The authors of *The Federalist* recognized this, specifically noting the value of federalism in curbing abuses of governmental power. Alexander Hamilton wrote that while the general government would check the "usurpations of the state governments, the state governments "will have the same disposition towards the general government." *The Federalist* No. 28, at 179 (A. Hamilton) (J. Cooke ed. 1961). James Madison likewise explained, "The different governments will control each other, at the same time that each will be controlled by itself." *The Federalist* No. 51, at 351 (J. Madison) (J. Cooke ed.

1961). States, Madison emphasized, retain powers that are "numerous and indefinite." *Gregory*, 501 U.S. at 457–58 (quoting *The Federalist* No. 45, at 292–93 (James Madison) (Clinton Rossiter ed. 1961).

This Court too has repeatedly explained that "[f]ederalism secures the freedom of the individual." *Bond*, 131 S. Ct. at 2364. Indeed, "[s]tate sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.' " *Id.* (quoting *New York* v. *United States*, 505 U.S. 144, 181 (1992)) (some internal quotations omitted). Federalism advances liberty in a number of ways:

- it promotes "decentralized government that will be more sensitive to the diverse needs of a heterogeneous society";
- it "increases opportunities for citizen involvement in democratic processes";
- it "allows for more innovation and experimentation in government";
- it "makes government more responsive by putting the States in competition for a mobile citizenry"; and
- it provides "a check on abuses of government power." *Gregory*, 501 U.S. at 458.

Because of the importance of federalism to our constitutional structure, this Court applies a clear-statement rule when interpreting statutes: "[I]f

Congress intends to alter the 'usual constitutional balance between the States and the Federal Government, it must make its intention unmistakably clear in the language of the statute.' " *Gregory*, 501 U.S. at 460–61 (quoting *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 243 (1985)). The burden is on Congress to use unambiguous and targeted statutory language. Courts may not consider less clear indicia of legislative intent or place their own overlay onto the statutory language.

A. The clear-statement rule protects the balance between the States and the federal government.

The clear-statement rule safeguards the important value discussed above: preserving the federal-state balance. Indeed, this Court explained that "congressional interference" in state internal matters of great importance "would upset the usual constitutional balance of federal and state powers." *Gregory*, 501 U.S. at 460.

In numerous cases both before and after *Gregory*, this Court has applied the clear-statement rule to protect States from unwarranted federal encroachment into traditional areas of state authority. See, e.g., *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006) (plurality opinion) ("We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority"); *Gonzales* v. *Oregon*, 546 U.S. 243, 274 (2006) ("[T]he background principles of our federal system [ ] belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police

power."); *Solid Waste Agency of N. Cook, County* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) ("This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."); *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) ("[W]hen the Federal Government takes over local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit.") (internal citations omitted); *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting *United States* v. *Bass*, 404 U.S. 336, 349 (1971)) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.").

B. The opinion below disregards the clear-statement rule and limits the States' authority to deputize contractors to assist in core state duties.

"[W]ho can deny that plaintiffs' interpretation of 'officer' 'trench[es] on the States' arrangements for conducting their own governments?' " Pet. 58a (Sutton, J., dissenting) (quoting *Nixon* v *Mo. Mun. League*, 541 U.S. 125, 140 (2004)). But despite this interference with State sovereignty, the Sixth Circuit majority concluded that appointed special counsel cannot be officers of the state within the meaning of the FDCPA. Pet. Ap. 29a. This conclusion conflicts with the approach of the only other Circuit to address

the issue, the Third Circuit, which held that the Philadelphia Municipal Court's appointed Landlord and Tenant Officer was an "officer." *Heredia* v. *Green*, 667 F.2d 392, 396 (3d Cir. 1981). Both *Heredia* and the dissent here recognized that adherence to the clear-statement rule protects fundamental federalism principles.

Further, the decision below misses the point of the clear-statement rule—that it applies when ambiguity exists and resolves ambiguity in favor of preserving state sovereignty. If the Dictionary Act's definition of "officer" is ambiguous in a particular context—and here, Plaintiffs conceded that the term was "open to multiple[] yet reasonable interpretations," Pet. App. 60a—then the exemption for state officers applies precisely because Congress has not *un*ambiguously regulated core state functions. Pet. App. 58a (Sutton, J., dissenting). As this Court has articulated, the clear-statement rule "resolves ambiguities in federal statutes" based on basic principles of federalism. *Bond* v. *United States*, 134 S. Ct. 2077, 2090 (2014). Because the Sixth Circuit failed to follow the rule, it fell into the very peril this Court has identified: " 'to give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* [v. *United States*, 105 S. Ct. 479 (1984)] relied to protect states' interests.' " *Gregory*, 501 U.S. at 464 (quoting L. Tribe, American Constitutional Law § 6-26, at 480 (2d ed. 1988)).

C. The decision below encroaches on the authority of State Attorneys General.

There is another reason why the opinion below matters to States other than Ohio. State Attorneys General must have the flexibility to delegate their powers to outside counsel and duly designated deputies—and accordingly, to balance any inherent liability with the benefits of any applicable exemptions such as the FDCPA's state-officer exemption.

The office of attorney general dates back to thirteenth and fourteenth century England when the *attornatus regis* served as the sovereign's primary legal representative and wielded considerable power that was subject to limitation only by the King. That office was carried over to colonial America as the office of attorney general. William C. Haflett, Jr., *Tice v. Department of Transportation: A Declining Role for the Attorney General?*, 63 N.C. L. Rev. 1051, 1053, (1985). As a state judge reminded, "[O]ne of the principal reasons that our founders established an Attorney General's office was to assure that important legal issues that will affect all state agencies had an advocate who is able to bring the expertise of government-wide representation before this Court, when we consider matters of overall importance to state government." *West Virginia Div. of Envtl. Protection* v. *Kingwood Coal Co.*, 200 W Va. 734, 755 n.1 (W. Va. S. Ct. App. 1997) (Starcher, J., dissenting).

Whether by constitution or by statute, all fifty states have an office of attorney general, and most recognize the Attorney General's considerable common-law powers. 7 AM JUR 2D *Attorney General* §

7 (2015). In almost every state, the Attorney General is the chief law officer. See, e.g., *Hodge* v. *Commonwealth*, 116 S.W.3d 463, 474 (Ky. 2003) (noting that "the Attorney General is the chief law officer and chief prosecutor of the Commonwealth").

Because of heavy workloads and responsibilities spanning a host of issues, State Attorneys General must often delegate their authority to outside counsel. 7A C.J.S. *Attorney General* § 25 (2015) ("[A] state statute may allow the attorney general to employ special counsel on a fee or salary basis " "subject to certain constraints on supervision and control."). Ohio might want to appoint special counsel to represent the state in proceedings in which the state is a party, to act as an attorney at law in an antitrust case, or to act as a prosecuting attorney in organized crime cases. Pet. App. 59a (Sutton, J., dissenting) (citing statutes).

In the same way, Michigan law repeatedly authorizes its Attorney General to delegate his authority to special counsel and to other persons. *Dearborn Fire Fighters Union, Local No. 412, I. A. F. F.* v. *City of Dearborn*, 394 Mich. 229, 309 (1975) (recognizing that the Attorney General may "appoint a learned lawyer as a Special Assistant Attorney General" and that "[i]t would be difficult to say that that Special Assistant Attorney General was not a public officer"). Numerous statutes recognize this. To give just a few examples, the Michigan Attorney General may:

(1) "employ counsel to be associated with him" "who, with him, shall fully represent the state" in actions to protect or assert the right

or title of the state to property, Mich. Comp. Laws § 21.162;

(2) appoint a special prosecuting attorney to perform the duties of a prosecuting attorney who is disqualified or otherwise unable to serve, Mich. Comp. Laws § 49.160;

(3) designate "other person[s]" to conduct investigations, Mich. Comp. Laws § 400.291(2);

(4) appoint a "special assistant attorney general" to represent the insurance commissioner, Mich. Comp. Laws § 500.214(4);

(5) "assign an independent special assistant attorney general who is under contract to the department of attorney general and is not a member of the state classified civil service" to advise and assist disciplinary subcommittees under the Public Health Code, Mich. Comp. Laws § 333.16237(2); and

(6) appoint special counsel to represent an employee of the Friend of the Court, Mich. Comp. Laws § 691.1408; see also 1985–1986 Mich. Op. Att'y Gen. 72.

In many States, special counsel bring suits on behalf of the citizens of their States that would otherwise be impossible due to a lack of personnel resources, expertise, and money. Leah Godesky, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?*, 42 Colum. J. L. & Soc. Probs. 587, 588 (2009). As an example, Rhode Island's former Attorney General

used private attorneys to represent the State in a fight against lead paint manufacturers. *Id.* at 589 (discussing *State* v. *Lead Indus., Ass'n*, 951 A.2d 428 (R.I. 2008)). As another, Oklahoma's former Attorney General similarly retained three plaintiffs' attorney firms to take on poultry companies he claimed had polluted the State's waterways with chicken manure. *Id.* (discussing *State of Oklahoma ex rel The Pollution Control Coordinating Bd* v. *Kerr-McGee Corp*, 619 P.2d 858 (Okla. 1980)).

Ohio, Michigan, Oklahoma, and Rhode Island are not anomalies. At least 34 State Attorneys General have statutory authority to delegate their duties to special counsel. The widespread authority of Attorneys General to delegate their authority, the benefits of state-officer status—whether in debt collection or in other areas—should not be diminished without a clear statement to the contrary.

D. The dissent's interpretation of "officer" is not a slippery slope that encompasses all who contract with the State.

The opinion below broadly proclaims that "[i]ndependent contractors are not officers under the plain language of the Dictionary Act." Pet. App. 43a. Of course, not all private contractors are state officers, nor would States want all of them to be. But the opinion's statement is incorrect because it leaves no room for the necessary analysis: whether the contractor "authorized by law," and whether it is performing "the duties of the office." 1 U.S.C. § 1.

Compare two contractors: the State hires a groundskeeper to maintain the lawn by its capitol and

also hires a special assistant attorney general to assist in major tobacco litigation. Both perform important work and add value to the State. But the former is not authorized by statute, his job tasks are not core state functions, and he is not subject to the same level of control and oversight as the Attorney General's delegate in court.

In the case of Ohio's special counsel, this control was exhibited in the use of Attorney General letterhead and the adoption of Attorney General protocols. Ohio special counsel *are*, contrary to the majority opinion, distinguishable "from the myriad of independent contractors who enter into for-profit agreements with government agencies or actors to help fulfill the duties of some government office." Pet App. 29a.

In analogous contexts, this Court has not treated all persons fulfilling some state task as officers of the State; instead, it has analyzed the nature of the relationship with the government. Consider, for example, questions of immunity. This Court has said that types of immunity (i.e., absolute versus qualified) "rest[] on functional categories, not on the status of the defendant." *Briscoe* v. *LaHue*, 460 U.S. 325, 342 (1983). And this Court has explained that private citizens may be entitled to immunity for actions taken while performing government operations. For example, grand jurors, though private citizens, have long enjoyed absolute immunity. *Imbler* v. *Pachtman*, 424 U.S. 409, 423 n.20 (1976). Similarly, just three years ago this Court granted qualified immunity to a private attorney temporarily retained by the government to carry out its work. *Filarsky* v. *Delia*,

132 S. Ct. 1657, 1665 (2012); see also *Bennett* v. *Frank*, 395 F.3d 409, 410 (7th Cir. 2005) (concluding that a state prison does not lose its immunity from liability under the Fair Labor Standards Act merely because it has hired a private company to manage the prison labor). Just as these immunities apply only to private citizens who are performing a government function and who meet the relevant legal tests, so too do only certain private citizens function in a capacity that is "authorized by law" to fulfill "the duties of office." 1 U.S.C. § 1.

Relatedly, governmental tort immunity applies to only some contractors. Nuanced inquiries into the specific duties and authority of contractors are important to the applicability of governmental tort immunity, where agencies retain immunity for government or public acts but not for acts that are merely proprietary or private in nature. 57 AM JUR 2d *Tort Liability* § 38 (2015). Accordingly, Michigan's operation of a state ferry as part of State's highway system was a governmental function as to which the State could not be held liable in tort. *Manion* v. *State Highway Comm'r.*, 5 N.W. 2d 527, 529 (Mich. 1942); see also Mich. Comp. Laws § 691.1413. Similarly, Kentucky courts have recognized that the State's protection and conservation of game is a governmental function and the State is "acting in its sovereign capacity for the common benefit of all of its people." *Commonwealth* v. *Masden*, 175 S.W.2d 1004, 1006 (Ky. 1943) (citing *Nicoulin* v. *O'Brien*, 189 S.W 724 (1916) (other citations omitted)).

Indeed, even applying common-law agency principles requires fact-intensive inquiries to determine whether a private contractor is functioning as an agent in the first place. See Restatement (Second) of Agency § 2 cmt. b (1958) (an "independent contractor" may be "an agent *under appropriate circumstances.*") (emphasis added). Likewise, this Court's Eleventh Amendment arm-of-the-state doctrine also employs a fact-intensive, multi-factored balancing approach in determining when to extend the State's sovereign immunity to other entities. See, e.g., *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280 (1977) (explaining that arm-of-the-state inquiry depends, in part, "upon the nature of the entity created by state law" and determining that the local school board was more like a county or city than an arm of the State because was subject to some guidance from the State Board of Education and received a significant amount of money from the State); *Port Auth. Trans-Hudson Corp.* v. *Feeney*, 110 S. Ct. 1868, 1876–77 (1990) (Brennan, J., concurring) ("[The entity] must be so "intricately intertwined with [and] so closely tied to the state as to be the direct means by which the state acts.").

In sum, the distinctions among independent contractors matter under the Dictionary Act just as they do under other relevant legal tests. Under the Act, it is important under what authority they were hired and under what authority and protocols they perform their work. And it matters what work they do. The Sixth Circuit closed the door on the "officer" inquiry without adequately considering these meaningful distinctions.

II. Congress has not clearly limited States' authority to make private contractors officers in the debt-collection context, and States need such broad tools to effectively manage their debt collection.

States have the sovereign authority to collect the debts owed them. As the dissent recounts, "From the founding, the States have taken debts—whether owed by them or to them—seriously." Pet. App. 55a (Sutton, J., dissenting). The States' interest in debt collection is no mere "policy concern," as the majority opinion characterized it. Pet. App. 28a–39a. Rather, it is an important piece of States' sovereign right to govern themselves in the way that best problem-solves and meets the needs of its citizens. State fiscal concerns are complex, requiring innovative solutions. These solutions often require revenue, and debt collection is an important factor in revenue-building.

A. In varying degrees, all States delegate some of their sovereign debt-collection power to non-employees.

Recently, the National Association of State Auditors, Comptrollers, and Treasurers, in conjunction with CGI, a leading information technology and business process services firm, conducted a survey in the hopes of helping States seek effective ways to raise needed revenue. *Government Debt Collection: Survey Report and Recommendations*, 1 (2010), *available at* http://www.cgi.com/sites/default/files/pdf/CGI-NASACT-report.pdf. The survey showed that, regardless of the type of system they employ, *every* one of the 50 states surveyed said they were using private

collection agencies to some degree and "at some point in the process." *Id.*, 3-5.

Michigan for example, relies on private collection agencies to collect debts owed to state agencies. Michigan centralizes its debt collection through an Office of Collections in its Department of Treasury. This centralized Office collects all overdue assessed taxes administered by the Michigan Department of Treasury and primary delinquent, non-tax debts owed to almost all state agencies. In total, over 200 different state agencies and local units of government have referred debts to the Office of Collections, and the Office collects over 325 debt types. Even though the Office employs a staff of approximately 85, state law authorizes the Department of Treasury to "contract with private collection agencies and law firms to collect taxes and other accounts due this state." 2014 Mich. Pub. Act 252, Part 2A, anticipated appropriations for fiscal year 2015-2016, Sec. 20-903(1), Department of Treasury, "Operations." Notably, the private company Michigan uses, GC Services Limited Partnership, explains that when it sends letters to individuals whose accounts have been referred for collection, it states it is operating "on behalf of the State of Michigan," and that its employees at the Michigan Accounts Receivable Collection System "are representatives of the Michigan Department of Treasury authorized to collect delinquent taxes owed to the State." (Appendix A, sample letter).

Like Michigan, other States also hire contractors to aid in their debt-collection efforts. Louisiana authorizes its centralized Office of Debt Recovery to

"contract with a third-party collection contractor for the collection of delinquent debt on behalf of the office." LA. STAT. ANN. § 47:1676(C)(3). Colorado, which also has a centralized system, COLO. REV. STAT. 24-30-202.4, requires the state controller to "legally assign all debts that are not claims in process of collection to private counsel or private collection agencies" within 180 days. Section 24-30-202.4(2). Similarly, Utah's centralized Office of Debt Collection is authorized to "contract with private or state agencies to collect past-due accounts." UTAH CODE ANN. 63A-3-502(4)(d).

While California has a quasi-centralized debt-collection system, it too relies on private contractors to fulfill its debt-collection duties. The California Franchise Tax Board is the state agency responsible for collection of state personal income tax and bank and corporation tax, and is authorized to hire private contractors for debt-collection purposes. CAL. REV. & TAX CODE §§19376–19378. Although private contractors may not hold themselves out to be Franchise Tax Board employees, they may, by contract, say they are collecting on behalf of the Franchise Tax Board. The Franchise Tax Board is also authorized to collect delinquent debts on behalf of state and local courts and on behalf of the Department of Motor Vehicles, as if those debts were a tax. CAL. REV. & TAX CODE § 19280 & § 10878. The California State Controller's Office reports that personal income taxes, sales and use taxes, and corporate income taxes make up the State's General Fund—the State's main checking account to fund state agency programs and state funds to local government. California State

Controller's Office, State Taxes, *available at* http://sco.ca.gov/.

States with decentralized systems use private contractors as well. See, e.g., OKLA. STAT. 205.2(b); OKLA. STAT. 255(A). But States often move toward debt-collection centralization because of its major benefits. Centralization facilitates increased automation, uniform collections practices, and enhanced collection tools. *Government Debt Collection: Survey Report and Recommendations* 8. Regardless of how they structure their debt-collection practices, States, as constitutional sovereigns, should retain the flexibility to decide for themselves whether to appoint private contractors to complete the core task of debt collection.

B. States other than Ohio authorize their Attorney General to "deputize" private individuals to assist in debt collection.

Like Ohio, other states such as Texas, Arkansas, and Alaska have statutes that authorize their Attorneys General to delegate their debt-collection authority. See TEX. GOV'T CODE ANN. § 2107.003(a)–(b) (West 2007); ARK. CODE ANN. § 25-16-708(a) (West 2015), ALASKA STAT. ANN. § 43.10.010(b) (West 2015). In Maryland, "[u]nder certain limited circumstances, the Secretary of Budget and Fiscal Planning and the Attorney General may hire private lawyers on a case-by-case basis to represent the State in debt collection actions." 74 Md. Op. Att'y Gen. 136, at 1 (1989). Additionally, Louisiana, New Jersey, New Hampshire, and Virginia statutes give their States' Attorney General the authority to undertake debt collection activities. See LA. REV. STAT. ANN.

§ 1676(A)(1) (West 2014); N.J. STAT. ANN. § 52:18–37 257(G)(West 2005); N.H. REV. STAT. ANN. § 7:15-a (West 2007); VA. CODE ANN. § 2.2-4803 (West 2008).

The complexity of state taxing structures and the need for robust state tax-collection programs underscore why States may need the flexibility to hire private contractors and to claim the state-officer exemption under the Fair Debt Collection Practices Act.

States' debt-collection systems often reflect the complexity of their taxing structure. Consider Michigan. Between 2011 and 2014, Michigan reported collecting over 31 types of state taxes—taxes as diverse as casino gaming, oil and gas severance, horse race wagering, liquor markup, property taxes, state education taxes, and airport parking excise taxes. Citizens Research Council of Michigan, Outline of the Michigan Tax System, p. 85, *available at* http://crcmich.org/PUBLICAT/2010s/2015/Tax%20Outline_ALL.pdf. That number represents a dramatic increase from the 22 types of taxes reported during the years 1993–1996. *Outline of the Michigan Tax System*, Report No. 322, *available at* http://www.crcmich.org/PUBLICAT/1990s/1997/rpt322.pdf. Increasing complexity demands state ingenuity and flexible tools.

In addition to their complexity, state tax structures are often in flux as State policy shifts and evolves. Michigan, for example, has in recent decades seen a shift from local taxation to state-level taxation in financing the State's K-12 school system. http://crcmich.org/PUBLICAT/2010s/2015/Tax_Outline_ALL.pdf. The State has also expanded its own tax

system through increased sales tax and a new real estate transfer tax. Michigan, as well as all States, must have the tools to keep pace with the changing tax landscape.

Why does this matter? In large part it matters because States are increasingly conscious of fiscal health. States continue to face the repercussions of the recent economic downturn. Sarah Arnett, *State Fiscal Condition: Ranking the 50 States* 3 (Mercatus Center at George Mason University, Working Paper No. 14-02, 2014). Fiscal simulations by the Government Accountability Office, an independent agency that provides Congress with audit, evaluation, and investigative services, suggest concern for the long-term outlook for States' fiscal condition. (*Id.*, citing GAO 2013). States need revenue, and revenue is tied to effective debt collection.

Not surprisingly then, the National Association of State Auditors, Comptrollers and Treasurers has recommended that States must aggressively explore better ways to increase efficiency and raise revenue to maintain citizen services. *Government Debt Collection: Survey Report and Recommendations* 11. Its survey report observed that enhancing debt-collection tools and capabilities would likely increase revenues "by scores of millions of dollars each year." *Id.* And according to the survey, a number of States are "considering expanding their delinquent debt collection programs to increase revenue from their accounts receivable as part of a balanced program for getting into, and staying in, fiscal shape." *Id.*

There are good reasons why robust state debt-collection programs are linked to increased revenue.

First, robust enforcement discourages nonpayment of taxes. Most state tax systems are based on voluntary compliance by taxpayers, so enforcement is a necessary activity to recover tax receivables and keep voluntary reporting and payment from decreasing. If the State is viewed as being lax on enforcement, voluntary-compliance numbers are almost certain to drop. Second, robust enforcement reduces the tax burden for the millions of individual citizens and businesses who *do* comply with the tax laws. Third, robust enforcement benefits tax-paying businesses through minimization of the unfair competitive advantage gained by businesses that do not pay their taxes.

But innovative and robust efforts to collect debts often require increased state intervention. This, in turn, is likely to require the assistance of private contractors.

Whether in debt collection or beyond, States need the flexibility to use private contractors. Their decision to do so may depend on whether they can derive the benefits and protections available from federal statutes such as the FDCPA.

CONCLUSION

For the reasons set forth, the petition should be granted.

Respectfully submitted,

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Dated: OCTOBER 2015

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APPENDIX A

MICHIGAN
ACCOUNTS RECEIVABLE COLLECTION SYSTEM
POST OFFICE BOX 30158
LANSING, MICHIGAN 48909

Date: December 8, 2014
Account No:
Contact Telephone No:
1-866-754-8649

Your account has been referred to the Michigan Accounts Receivable Collection System (MARCS), which is operated on behalf of the State of Michigan by GC Services Limited Partnership, a private debt collection company. GC Services Limited Partnership employees at the Michigan Accounts Receivable Collection System (MARCS) site are representatives of the Michigan Department of Treasury authorized to collect delinquent taxes owed to the State. **To avoid further collection activity, send your payment in full along with a copy of the State's notice in the enclosed envelope immediately.**

You have previously received a final demand letter from the Michigan Department of Treasury summarizing your account. If you have questions about your account, you should call the number listed above. This is an attempt to collect amounts due to the State and any information obtained will be used by GC Services Limited Partnership, only for that purpose.

For your convenience, you can now pay on the web at no additional charge by going to www.michigan.gov/collectionseservice

LT-91P-B (Rev. 09/13)
Letter G-1091 (MARCS)

Enclosures:
Attachment
Envelope

JAN 25 2016
OFFICE OF THE CLERK

No. 15-338

In the Supreme Court of the United States

MARK J. SHERIFF, ET AL.,

Petitioners,

v.

PAMELA GILLIE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED SEPTEMBER 15, 2015
CERTIORARI GRANTED DECEMBER 11, 2015

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Doc. 17: Answer of Defendants Eric A. Jones and Law Office of Eric A. Jones, LLC, U.S. District Court, Southern District of Ohio, filed May 28, 2013 59

Doc. 24: Answer and Counterclaim of Intervening Defendant Ohio Attorney General Michael DeWine, U.S. District Court, Southern District of Ohio, filed August 21, 2013 77

Doc. 25: Answer of Defendants Wiles, Boyle, Burkholder & Bringardner Co., LPA, Mark Sheriff and Sarah Sheriff to Plaintiff's Complaint, U.S. District Court, Southern District of Ohio, filed August 22, 2013 108

Doc. 31: Plaintiffs' Answer to Counterclaim of Intervenor Ohio Attorney General Michael DeWine, U.S. District Court, Southern District of Ohio, filed September 10, 2013 112

Doc. 36-1: Joint Stipulation of Facts, *State of Ohio v. Nobile & Thompson Company, LPA*, Case No. 2:12-CV-1053, U.S. District Court, Southern District of Ohio, October 7, 2013 118

Doc. 47-1: Affidavit of Mark J. Sheriff, U.S. District Court, Southern District of Ohio, filed February 3, 2014 133

Doc. 48-1: Affidavit of Pamela Gillie, U.S. District Court, Southern District of Ohio, filed February 3, 2014 135

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Doc. 48-16: Advisory Opinion 75-016, August 19, 1975 375

Doc. 60-1: Affidavit of Sarah Sheriff, U.S. District Court, Southern District of Ohio, filed March 4, 2014 384

Doc. 60-2: Affidavit of Mark Sheriff, U.S. District Court, Southern District of Ohio, filed March 4, 2014 387

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RELEVANT DOCKET ENTRIES

Pamela Gillie, et al v.
Law Office of Eric A. Jones, et al,
U.S. Court of Appeals
for the Sixth Circuit
Case No. 14-3836

08/26/2014	2	Civil Case Docketed. Notice filed by Appellants Pamela Gillie and Hazel Meadows. Transcript needed: n. (BLH)
08/26/2014	3	The case manager for this case is: Beverly Harris (BLH)
08/26/2014	4	BRIEFING LETTER SENT setting briefing schedule: appellant brief due 10/08/2014; appellee brief due 11/10/2014. (BLH)
08/27/2014	5	APPEARANCE filed for Appellees Eric A. Jones and Law Office of Eric A. Jones, LLC by Boyd W. Gentry. Certificate of Service: 08/27/2014. (BWG)
08/27/2014	6	CORPORATE DISCLOSURE STATEMENT filed by Attorney Mr. Boyd William Gentry for Appellees Law Office of Eric A. Jones, LLC and Eric A. Jones Certificate of Service: 08/27/2014. (BWG)
08/27/2014	7	Mediation Office is involved in this appeal. (LMR)
08/27/2014	8	A Telephone Mediation conference

		has been scheduled for 09/18/2014 at 9:30 AM (ET) with Paul Calico. [Please open notice for important details and deadlines.] (LMR)
09/09/2014	9	Letter sent by Mediation Office regarding mediation: The Mediation conference scheduled for 9/18/2014 is hereby canceled. (LMR)
09/09/2014	10	Mediation Office is no longer involved in this appeal. (MLB)
09/09/2014	11	APPEARANCE filed for Appellee Ohio Attorney General by Sherry M. Phillips. Certificate of Service: 09/09/2014. (SMP)
09/09/2014	12	APPEARANCE filed for Appellants Pamela Gillie and Hazel Meadows by James E. Nobile. Certificate of Service: 09/09/2014. (JEN)
09/09/2014	13	CORPORATE DISCLOSURE STATEMENT filed by Attorney Mr. James E. Nobile for Appellant Hazel Meadows Certificate of Service: 09/09/2014. (JEN)
09/09/2014	14	CORPORATE DISCLOSURE STATEMENT filed by Attorney Mr. James E. Nobile for Appellant Hazel Meadows Certificate of Service: 09/09/2014. (JEN)
09/09/2014	15	APPEARANCE filed for Appellee Ohio Attorney General by Christopher P Conomy. Certificate

of Service: 09/05/2014. (CPC)

09/09/2014 16 APPEARANCE filed for Appellants Pamela Gillie and Hazel Meadows by Eric E. Willison. Certificate of Service: 09/09/2014. (EEW)

10/08/2014 17 APPELLANT BRIEF filed by Mr. James E. Nobile for Hazel Meadows. Certificate of Service:10/08/2014. Argument Request: requested. (lLOCKED; corrected brief filed 10/13/2014).--[Edited 12/03/2014 by BLH] (JEN)

10/09/2014 18 BRIEFING LETTER SENT requesting brief corrections from Mr. James E. Nobile for Hazel Meadows because addendum items should be combined into one addendum. Corrections due: 10/23/2014. (BLH)

10/13/2014 19 CORRECTED Plaintiffs-Appellants Pamela Gillie and Hazel Meadows' Brief Filed 10/8/2014 BRIEF filed by Mr. James E. Nobile for Hazel Meadows. Certificate of Service:10/13/2014. Argument Request: requested. (JEN)

11/10/2014 20 APPELLEE BRIEF filed by Ms. Sherry M. Phillips for Ohio Attorney General. Certificate of Service:11/10/2014. Argument Request: requested. (LOCKED; brief corrections requested see following

		letter).--[Edited 11/10/2014 by BLH] (SMP)
11/10/2014	21	BRIEFING LETTER SENT requesting brief corrections from Ms. Sherry M. Phillips for Ohio Attorney General because Designation of Relevant District Court Documents with Page ID# range not included.. Corrections due: 11/24/2014. (BLH)
11/10/2014	22	CORRECTED Brief of Appellee Ohio Attorney General BRIEF filed by Ms. Sherry M. Phillips for Ohio Attorney General. Certificate of Service:11/10/2014. Argument Request: requested. (SMP)
11/10/2014	23	APPEARANCE filed for Appellees Mark Jeffrey Sheriff, Sarah Sheriff and Wiles, Boyle, Burkholder, & Bringardner Co., LPA by Dale D. Cook. Certificate of Service: 11/10/2014. (DDC)
11/10/2014	24	CORPORATE DISCLOSURE STATEMENT filed by Attorney Mr. Dale D. Cook for Appellees Wiles, Boyle, Burkholder, & Bringardner Co., LPA, Mark Jeffrey Sheriff and Sarah Sheriff Certificate of Service: 11/10/2014. (DDC)
11/10/2014	25	APPELLEE BRIEF filed by Mr. Dale D. Cook for Wiles, Boyle, Burkholder, & Bringardner Co.,

		LPA, Mark Jeffrey Sheriff and Sarah Sheriff. Certificate of Service:11/10/2014. Argument Request: requested. (DDC)
11/11/2014	26	APPELLEE BRIEF filed by Mr. Boyd William Gentry for Law Office of Eric A. Jones, LLC and Eric A. Jones. Certificate of Service:11/10/2014. Argument Request: requested. (BWG)
11/12/2014	27	MOTION filed by Mr. Boyd William Gentry for Law Office of Eric A. Jones, LLC and Eric A. Jones to extend time to file brief. Certificate of Service: 11/12/2014. (BWG)
11/12/2014	28	RULING LETTER SENT granting motion to extend time to file brief [27] filed by Mr. Boyd William Gentry. (BLH)
11/12/2014	29	NOTIFICATION filed by Mr. Boyd William Gentry for Law Office of Eric A. Jones, LLC and Eric A. Jones regarding Oral Argument. Certificate of Service: 11/12/2014. (BWG)
11/24/2014	30	REPLY BRIEF filed by Attorney Mr. James E. Nobile for Appellant Hazel Meadows. Certificate of Service:11/24/2014. (LOCKED; counsel is directed to file one combined reply brief to the appellees' briefs within 7 days).--

[Edited 12/03/2014 by BLH] (JEN)

11/24/2014 31 REPLY BRIEF filed by Attorney Mr. James E. Nobile for Appellant Hazel Meadows. Certificate of Service:11/24/2014. (LOCKED; counsel is directed to file one combined reply brief to the appellees' briefs within 7 days).-- [Edited 12/03/2014 by BLH] (JEN)

11/24/2014 32 REPLY BRIEF filed by Attorney Mr. James E. Nobile for Appellant Hazel Meadows. Certificate of Service:11/24/2014. (LOCKED; counsel is directed to file one combined reply brief to the appellees' briefs within 7 days).-- [Edited 12/03/2014 by BLH] (JEN) (JEN)

12/03/2014 33 BRIEFING LETTER SENT requesting brief corrections from Mr. James E. Nobile for Hazel Meadows and Pamela Gillie. Counsel is driected to file one reply brief to the appellees' briefs, 15 pages OR 7000 words (proportional fonts) OR up to 650 lines (monospaced font).. Corrections due: 12/10/2014. (BLH)

12/03/2014 34 MOTION filed by Mr. James E. Nobile for Hazel Meadows to reconsider order dated 12/03/2014. Certificate of Service: 12/03/2014. (JEN)

12/09/2014	35	MOTION filed by Mr. James E. Nobile for Hazel Meadows to extend time to file brief. Certificate of Service: 12/09/2014. (JEN)
12/15/2014	36	ORDER: The motion to reconsider is GRANTED IN PART and DENIED IN PART, in that the plaintiffs are directed to file a single reply that does not exceed 21,000 words in length. In the interest of timely submission of this appeal to the court, the plaintiffs are directed to file that brief within 21 days of the entry of this order. Reply brief due 01/05/2015. [34], [35]. (BLH)
01/05/2015	37	CORRECTED Three separate reply briefs to Appellees' principal briefs BRIEF filed by Mr. James E. Nobile for Hazel Meadows. Certificate of Service:01/05/2015. Argument Request: requested. (LOCKED; wrong entry. Counsel is asked to redocket using the correct relief, reply brief filed).--[Edited 01/05/2015 by BLH] (JEN)
01/05/2015	38	REPLY BRIEF filed by Attorney Mr. James E. Nobile for Appellant Hazel Meadows. Certificate of Service:01/05/2015. (JEN)
01/07/2015	39	Oral argument date set for 9:00 a.m., Tuesday, March 3, 2015. Notice of argument sent to counsel on 01/07/2015. (MCP)

01/07/2015 40 Oral argument acknowledgment filed by Attorney Mr. Boyd William Gentry for Appellees Law Office of Eric A. Jones, LLC and Eric A. Jones. Certificate of Service: 01/07/2015. (BWG)

01/20/2015 41 Oral argument acknowledgment filed by Attorney Mr. James E. Nobile for Appellant Hazel Meadows. Certificate of Service: 01/20/2015. (JEN)

01/20/2015 42 APPEARANCE filed for Appellees Mark Jeffrey Sheriff, Sarah Sheriff and Wiles, Boyle, Burkholder, & Bringardner Co., LPA by Michael L. Close. Certificate of Service: 01/20/2015. (LOCKED, Mr. Michael L. Close was asked to redocket using his PACER account).--[Edited 01/20/2015 by BLH] (DDC)

01/20/2015 43 APPEARANCE filed for Appellees Mark Jeffrey Sheriff, Sarah Sheriff and Wiles, Boyle, Burkholder, & Bringardner Co., LPA by Michael L. Close. Certificate of Service: 01/20/2015. (LOCKED, attached document is an oral argument acknowledgment from Mr. Michael L. Close).--[Edited 01/20/2015 by BLH] (DDC)

01/20/2015 44 Oral argument acknowledgment filed by Attorney Mr. Dale D. Cook for Appellees Wiles, Boyle,

		Burkholder, & Bringardner Co., LPA, Mark Jeffrey Sheriff and Sarah Sheriff. Certificate of Service: 01/20/2015. (LOCKED, acknowledgment is from Mr. Michael L. Close. Mr. Close is asked to redocket using his PACER account).--[Edited 01/20/2015 by BLH] (DDC)
01/21/2015	45	APPEARANCE filed for Appellees Mark Jeffrey Sheriff, Sarah Sheriff and Wiles, Boyle, Burkholder, & Bringardner Co., LPA by Michael L. Close. Certificate of Service: 01/21/2015. (MLC)
01/21/2015	46	Oral argument acknowledgment filed by Attorney Mr. Michael L. Close for Appellees Wiles, Boyle, Burkholder, & Bringardner Co., LPA, Mark Jeffrey Sheriff and Sarah Sheriff. Certificate of Service: 01/21/2015. (MLC)
01/21/2015	47	Oral argument acknowledgment filed by Attorney Ms. Sherry M. Phillips for Appellee Ohio Attorney General. Certificate of Service: 01/21/2015. (SMP)
01/22/2015	48	MOTION filed by Ms. Sherry M. Phillips for Ohio Attorney General to continue oral argument. Certificate of Service: 01/22/2015. (SMP)

01/22/2015	49	RESPONSE in opposition filed regarding a motion to continue oral argument, [48]; previously filed by Ms. Sherry M. Phillips in 14-3836. Response from Attorney Mr. James E. Nobile for Appellant Hazel Meadows Certificate of Service:01/22/2015. (JEN)
01/23/2015	50	ORDER filed denying motion to continue oral argument [48] filed by Ms. Sherry M. Phillips. Entered by order of the court. (YH)
02/24/2015	51	Oral argument acknowledgment filed by Attorney Mr. Christopher Paul Conomy for Appellee Ohio Attorney General. Certificate of Service: 02/24/2015. (CPC)
02/24/2015	52	Oral argument acknowledgment filed by Attorney Mr. Christopher Paul Conomy for Appellee Ohio Attorney General. Certificate of Service: 02/24/2015. (LOCKED; duplicate).--[Edited 02/24/2015 by BLH] (CPC)
03/03/2015	53	CAUSE ARGUED by Mr. James E. Nobile for Appellant Hazel Meadows, et al, Mr. Michael L. Close for Appellees Wiles, Boyle, Burkholder, & Bringardner Co., LPA, et al, Mr. Christopher Paul Conomy for Appellee Ohio Attorney General and Mr. Boyd William Gentry for Appellees Law Office of

		Eric A. Jones, LLC and Eric A. Jones before Clay,Circuit Judge; Gilman,Circuit Judge and Sutton,Circuit Judge. (KSC)
05/08/2015	54	OPINION and JUDGMENT filed : The grant of summary judgment in favor of Defendants is VACATED, and the case is REMANDED for further proceedings consistent with the opinion of this court. Decision for publication. Eric L. Clay (AUTHORING), Ronald Lee Gilman, and Jeffrey S. Sutton (DISSENTING), Circuit Judges. (CL)
05/18/2015	55	APPEARANCE filed for Appellee Ohio Attorney General by Eric E. Murphy. Certificate of Service: 05/18/2015. (EEM)
05/18/2015	56	APPEARANCE filed for Appellee Ohio Attorney General by Peter Reed. Certificate of Service: 05/18/2015. (PTR)
05/18/2015	57	APPEARANCE filed for Appellee Ohio Attorney General by Michael J. Hendershot. Certificate of Service: 05/18/2015. (MJH)
05/18/2015	58	APPEARANCE filed for Appellee Ohio Attorney General by Samuel C. Peterson. Certificate of Service: 05/18/2015. (SCP)
05/21/2015	59	PETITION for en banc rehearing

filed by Mr. Eric E. Murphy for Ohio Attorney General, Mr. Dale D. Cook for Wiles, Boyle, Burkholder, & Bringardner Co., LPA, Mark Jeffrey Sheriff and Sarah Sheriff. Certificate of Service: 05/21/2015.-- [Edited 05/21/2015 by BLH] (EEM)

05/21/2015 60 PETITION for en banc rehearing filed by Mr. Boyd William Gentry for Law Office of Eric A. Jones, LLC and Eric A. Jones. Certificate of Service: 05/21/2015. (BWG)

06/01/2015 61 LETTER SENT to Mr. James E. Nobile for Hazel Meadows and Pamela Gillie, notifying that he is directed to respond to the petitions for en banc rehearing filed by Mr. Eric E. Murphy and Mr. Boyd William Gentry. Response due 06/15/2015. (BLH)

06/13/2015 62 RESPONSE to petition for en banc rehearing, [60], previously filed by filed by Mr. Boyd William Gentry in 14-3836 , petition for en banc rehearing, [59], previously filed by filed by Mr. Eric E. Murphy in 14-3836. Response filed by Mr. James E. Nobile for Hazel Meadows. Certificate of service: 06/13/2015. (JEN)

07/14/2015 63 ORDER filed denying petition for en banc rehearing [59] filed by Mr. Eric E. Murphy, denying petition for en

banc rehearing [60] filed by Mr. Boyd William Gentry. Eric L. Clay, Ronald Lee Gilman, and Jeffrey S. Sutton, Circuit Judges. Clay, Circuit Judge concurring in the denial of rehearing en banc; Sutton, Circuit Judge, dissenting from the denial of rehearing en banc joined by, Boggs, J., Batchelder, J., Cook, J., and McKeague, J.. (Cover letter uploaded).--[Edited 07/14/2015 by BLH] (BLH)

07/21/2015 65 MOTION filed by Mr. Eric E. Murphy for Ohio Attorney General, Mr. Dale D. Cook for Wiles, Boyle, Burkholder, & Bringardner Co., LPA, Mark Jeffrey Sheriff and Sarah Sheriff , and Mr. Boyd William Gentry for Law Office of Eric A. Jones, LLC and Eric A. Jones to stay mandate. Certificate of Service: 07/21/2015. (Additional parties added).--[Edited 07/21/2015 by BLH] (EEM)

07/22/2015 66 ORDER: Upon consideration of Appellees' motion to stay the mandate, it is ORDERED that the mandate be stayed to allow Appellees to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case, but shall promptly issue if the petition is not filed within the time allowed by the Federal Rules of

Appellate Procedure [65]. Further, the appellees are required to file a status report within 90 days and every 30 days thereafter. First status report due 10/13/2015. Eric L. Clay, Ronald Lee Gilman, and Jeffrey S. Sutton, Circuit Judges. (BLH)

07/31/2015 67 MOTION filed by Mr. Eric Eastman Willison for Pamela Gillie and Hazel Meadows to reconsider order dated 07/22/2015. Certificate of Service: 07/31/2015. (EEW)

08/05/2015 68 ORDER filed denying motion to reconsider order filed on 07/22/2015 staying the mandate [67] filed by Mr. Eric Eastman Willison. Entered by order of the court. (BLH)

09/18/2015 69 STATUS REPORT filed by Mr. Eric E. Murphy for Ohio Attorney General. Certificate of Service: 09/18/2015. Next status report due 10/19/2015 (EEM)

09/22/2015 70 U.S. Supreme Court notice filed regarding a petition for a writ of certiorari filed by Appellee Mark J. Sheriff. Supreme Court Case No:15-338, 09/15/2015. (CL)

10/13/2015 71 STATUS REPORT filed by Mr. Eric E. Murphy for Ohio Attorney General. Certificate of Service: 10/13/2015. Next status report due

11/12/2015 (EEM)

11/12/2015	72	STATUS REPORT filed by Mr. Eric E. Murphy for Ohio Attorney General. Certificate of Service: 11/12/2015. Next status report due 12/14/2015 (EEM)
11/18/2015	73	U.S. Supreme Court notice filed regarding a petition for a writ of certiorari filed by Appellee Eric A. Jones. Supreme Court Case No:15-620, 10/07/2015. (CL)
12/14/2015	74	STATUS REPORT filed by Mr. Eric E. Murphy for Ohio Attorney General. Certificate of Service: 12/14/2015. Next status report due 01/13/2016 (EEM)
12/18/2015	75	U.S. Supreme Court letter filed granting the petition for a writ of certiorari [73] filed by Eric A. Jones.. Supreme Court Case No: 15-338, 12/11/2015.. (CL)

Gillie et al v. Law Office of Eric A. Jones, LLC et al,
U.S. District Court
Southern District of Ohio
Case No. 2:13-cv-00212-JLG-EPD

03/05/2013	1	COMPLAINT with JURY DEMAND against All Defendants (Filing fee $ 350 paid receipt number: 0648-4008173), filed by Pamela Gillie, Hazel Meadows. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Civil Cover Sheet) (Willison, Eric) (Entered: 03/05/2013)
03/08/2013	2	RELATED CASE MEMORANDUM ORDER: The Judges agree that this case and case number 2:12-cv-1053 are NOT related. Signed by Judge James L Graham and Judge Gregory L Frost on 3/8/2013. (pes1) (Entered: 03/08/2013)
04/05/2013	3	MOTION to Intervene *as Defendant and Counterclaimant* by Intervenor Defendant Ohio Attorney General. (Conomy, Christopher) (Entered: 04/05/2013)
04/05/2013	4	MOTION to Intervene *Memorandum in Support* by Intervenor Defendant Ohio Attorney General. (Conomy, Christopher) (Entered: 04/05/2013)
04/05/2013	5	***PROPOSED*** ANSWER to 1

		Complaint, COUNTERCLAIM *for declaratory judgment* against All Plaintiffs filed by Ohio Attorney General. (Conomy, Christopher) (Entered: 04/05/2013)
04/05/2013	6	MOTION to Stay by Counter Claimant Ohio Attorney General, Intervenor Defendant Ohio Attorney General. (Conomy, Christopher) (Entered: 04/05/2013)
04/05/2013	7	MOTION to Stay re 6 MOTION to Stay *Memorandum in Support* by Counter Claimant Ohio Attorney General, Intervenor Defendant Ohio Attorney General. (Attachments: # 1 Exhibit) (Conomy, Christopher) (Entered: 04/05/2013)
04/09/2013	8	NOTICE of Appearance by Boyd W Gentry for Defendants Eric A. Jones, Law Office of Eric A. Jones, LLC (Gentry, Boyd) (Entered: 04/09/2013)
04/19/2013	9	RESPONSE in Opposition re 4 MOTION to Intervene *Memorandum in Support*, 3 MOTION to Intervene *as Defendant and Counterclaimant* filed by Plaintiffs Pamela Gillie, Hazel Meadows. (Attachments: # 1 Exhibit A) (Willison, Eric) (Entered: 04/19/2013)

04/19/2013	10	RESPONSE to Motion re 6 MOTION to Stay , 7 MOTION to Stay re 6 MOTION to Stay *Memorandum in Support* filed by Plaintiffs Pamela Gillie, Hazel Meadows. (Willison, Eric) (Entered: 04/19/2013)
04/19/2013	11	MOTION to Strike *Ohio Attorney General's Answer and Counterclaim* by Plaintiffs Pamela Gillie, Hazel Meadows. Responses due by 4/26/2013 (Willison, Eric) (Entered: 04/19/2013)
04/23/2013	12	RESPONSE to Motion re 3 MOTION to Intervene *as Defendant and Counterclaimant* filed by Defendants Eric A. Jones, Law Office of Eric A. Jones, LLC. (Gentry, Boyd) (Entered: 04/23/2013)
05/03/2013	13	REPLY to Response to Motion re 4 MOTION to Intervene *Memorandum in Support*, 6 MOTION to Stay , 3 MOTION to Intervene *as Defendant and Counterclaimant*, 7 MOTION to Stay re 6 MOTION to Stay *Memorandum in Support* filed by Counter Claimant Ohio Attorney General, Intervenor Defendant Ohio Attorney General. (Attachments: # 1 Exhibit) (Conomy, Christopher) (Entered:

05/03/2013)

05/03/2013	14	RESPONSE to Motion re 11 MOTION to Strike *Ohio Attorney General's Answer and Counterclaim* filed by Counter Claimant Ohio Attorney General, Intervenor Defendant Ohio Attorney General. (Conomy, Christopher) (Entered: 05/03/2013)
05/09/2013	15	NOTICE of Appearance by Dale Daniel Cook for Defendants Mark Sheriff, Sarah Sheriff, Wiles, Boyle, Burkholder, & Bringardner Co., LPA (Cook, Dale) (Entered: 05/09/2013)
05/09/2013	16	MOTION Extension of Answer and Stay of All Proceedings by Defendants Mark Sheriff, Sarah Sheriff, Wiles, Boyle, Burkholder, & Bringardner Co., LPA. (Cook, Dale) (Entered: 05/09/2013)
05/28/2013	17	ANSWER to 1 Complaint, filed by Eric A. Jones, Law Office of Eric A. Jones, LLC. (Gentry, Boyd) (Entered: 05/28/2013)
06/27/2013	18	First MOTION Scheduling a Pre-trial Conference by Plaintiffs Pamela Gillie, Hazel Meadows. (Willison, Eric) (Entered: 06/27/2013)
06/28/2013	19	ORDER denying 11 Motion to Strike. Signed by Magistrate Judge

		Elizabeth Preston Deavers on 06/28/2013. (sr1) (Entered: 06/28/2013)
07/08/2013	20	NOTICE of Hearing: Preliminary Pretrial Conference set for 8/21/2013 11:00 AM in Chambers before Magistrate Judge Elizabeth Preston Deavers. (sln1) (Entered: 07/08/2013)
08/14/2013	21	RULE 26(f) REPORT by Plaintiff Pamela Gillie. (Zieg, Michael) (Entered: 08/14/2013)
08/20/2013	22	NOTICE OF CHANGE IN CONFERENCE DATE: Preliminary Pretrial Conference reset to 9/10/2013 11:00 AM in Chambers before Magistrate Judge Elizabeth Preston Deavers. (Previously set for 8/21/2013.) (sln1) (Entered: 08/20/2013)
08/21/2013	23	OPINION AND ORDER granting 3 the OAG's Motion to Intervene as a Defendant and Counterclaimant. Signed by Magistrate Judge Elizabeth Preston Deavers on 8/21/2013. (er) (Entered: 08/21/2013)
08/21/2013	24	ANSWER to 1 Complaint & COUNTERCLAIM against Pamela Gillie and Hazel Meadows filed by Ohio Attorney General. (er) (Entered: 08/21/2013)

08/22/2013	25	ANSWER to 1 Complaint, with Jury Demand filed by Mark Sheriff, Sarah Sheriff, Wiles, Boyle, Burkholder, & Bringardner Co., LPA. (Cook, Dale) (Entered: 08/22/2013)
08/29/2013	26	MOTION for Order to *Deem Motion to Stay Proceedings and Responsive Memoranda as Filed, Instanter* by Counter Claimant Ohio Attorney General. (Attachments: # 1 Exhibit A) (Phillips, Sherry) (Entered: 08/29/2013)
08/30/2013	27	ORDER granting OAG's 26 Motion to Deem Motion to Stay Proceedings and Responsive Memoranda as Filed Instanter. Signed by Magistrate Judge Elizabeth Preston Deavers on 8/30/2013. (er1) (Entered: 08/30/2013)
09/06/2013	28	ORDER denying motion to stay (doc. 6) and ordering additional briefing. Signed by Judge James L Graham on 9/6/13. (ds) (Entered: 09/06/2013)
09/09/2013	29	NOTICE of Appearance by Mark David Landes for Defendants Mark Sheriff, Sarah Sheriff, Wiles, Boyle, Burkholder, & Bringardner Co., LPA (Landes, Mark) (Entered: 09/09/2013)

09/09/2013	30	ORDER: The Preliminary Pretrial Conference set for 9/10/2013 is VACATED. Signed by Magistrate Judge Elizabeth Preston Deavers on 9/9/2013. (er1) (Entered: 09/09/2013)
09/10/2013	31	ANSWER to 24 Answer to Complaint, Counterclaim filed by All Plaintiffs. (Nobile, James) (Entered: 09/10/2013)
09/23/2013	32	ORDER finding as moot 16 Motion. Signed by Judge James L Graham on 9/23/13. (ds) (Entered: 09/23/2013)
10/07/2013	33	BRIEF re 28 Order on Motion to Stay, by Counter Claimant Ohio Attorney General. (Attachments: # 1 Exhibit A) (Phillips, Sherry) (Entered: 10/07/2013)
10/07/2013	34	BRIEF re 28 Order on Motion to Stay, by Defendants Mark Sheriff, Sarah Sheriff, Wiles, Boyle, Burkholder, & Bringardner Co., LPA. (Cook, Dale) (Entered: 10/07/2013)
10/07/2013	35	BRIEF by Plaintiffs Pamela Gillie, Hazel Meadows, Counter Defendants Pamela Gillie, Hazel Meadows. (Attachments: # 1 Exhibit Advisory Opinion, # 2 Exhibit Unreported Case Keefer) (Willison, Eric) (Entered:

10/07/2013)

10/07/2013	36	BRIEF by Defendants Eric A. Jones, Law Office of Eric A. Jones, LLC. (Attachments: # 1 Exhibit Stipulations) (Gentry, Boyd) (Entered: 10/07/2013)
10/21/2013	37	Reply re 28 Order on Motion to Stay, by Counter Claimant Ohio Attorney General, Intervenor Defendant Ohio Attorney General. (Conomy, Christopher) (Entered: 10/21/2013)
10/22/2013	38	Reply re 28 Order on Motion to Stay, *REPLY OF DEFENDANTS WEBB, MARK SHERIFF AND SARAH SHERIFF ON BIFURCATION* by Defendants Mark Sheriff, Sarah Sheriff, Wiles, Boyle, Burkholder, & Bringardner Co., LPA. (Cook, Dale) (Entered: 10/22/2013)
10/22/2013	39	BRIEF re 28 Order on Motion to Stay, by Plaintiffs Pamela Gillie, Hazel Meadows, Counter Defendants Pamela Gillie, Hazel Meadows. (Zieg, Michael) (Entered: 10/22/2013)
10/22/2013	40	Response *to Plaintiffs' Memorandum on Bifurcation* by Defendants Eric A. Jones, Law Office of Eric A. Jones, LLC. (Gentry, Boyd) (Entered:

10/22/2013)

12/03/2013	41	First MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM by Plaintiffs Pamela Gillie, Hazel Meadows. (Willison, Eric) (Entered: 12/03/2013)
12/04/2013	42	OPINION AND ORDER The Court ORDERS that this case be bifurcated. The parties shall submit dispositive motions within 60 days of this Order being entered. The Courts Order staying discovery will remain in place pending resolution of the liability issues in this case. Signed by Judge James L Graham on 12/4/2013. (ds) (Entered: 12/04/2013)
12/04/2013		Set/Reset Columbus PPTO Deadlines: Dispositive motions due w/in sixty (60) days per 42 (kk2) (Entered: 12/05/2013)
12/20/2013	43	RESPONSE in Opposition re 41 First MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Counter Claimant Ohio Attorney General. (Phillips, Sherry) Modified on 12/23/2013 to correct text (kk2) (Entered: 12/20/2013)
12/24/2013	44	RESPONSE in Opposition re 41 First MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

		MEMORANDUM OF WBBB, MARK SHERIFF AND SARAH SHERIFF IN OPPOSITION TO MOTION TO DISMISS DECLARATORY JUDGMENT CLAIMS filed by Defendants Mark Sheriff, Sarah Sheriff, Wiles, Boyle, Burkholder, & Bringardner Co., LPA. (Cook, Dale) (Entered: 12/24/2013)
01/08/2014	45	REPLY to Response to Motion re 41 First MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *Relating To Memorandum In Opposition Of Wiles, Boyle, Burkholder & Bringardner Co., LPA, Mark Sheriff And Sarah Sheriff* filed by Plaintiffs Pamela Gillie, Hazel Meadows, Counter Defendants Pamela Gillie, Hazel Meadows. (Nobile, James) (Entered: 01/08/2014)
02/03/2014	46	MOTION for Judgment on the Pleadings by Counter Claimant Ohio Attorney General, Intervenor Defendant Ohio Attorney General. Responses due by 2/27/2014 (Conomy, Christopher) (Entered: 02/03/2014)
02/03/2014	47	MOTION for Summary Judgment by Defendants Mark Sheriff, Sarah Sheriff, Wiles, Boyle, Burkholder, & Bringardner Co., LPA.

		Responses due by 2/27/2014 (Attachments: # 1 Exhibit 1 - Affidavit of Mark J. Sheriff, # 2 Exhibit 2 Clark v. Main Street) (Cook, Dale) (Entered: 02/03/2014)
02/03/2014	48	MOTION for Summary Judgment by Plaintiffs Pamela Gillie, Hazel Meadows, Counter Defendants Pamela Gillie, Hazel Meadows. Responses due by 2/27/2014 (Attachments: # 1 Exhibit A, # 2 Exhibit A1, # 3 Exhibit B, # 4 Exhibit B1, # 5 Exhibit C, # 6 Exhibit C1, # 7 Exhibit C2, # 8 Exhibit C3, # 9 Exhibit C4, # 10 Exhibit C5, # 11 Exhibit C6, # 12 Exhibit C7, # 13 Exhibit D, # 14 Exhibit E, # 15 Exhibit F, # 16 Exhibit G) (Zieg, Michael) (Entered: 02/03/2014)
02/03/2014	49	First MOTION for Summary Judgment by Plaintiff Hazel Meadows. Responses due by 2/27/2014 (Willison, Eric) (Entered: 02/03/2014)
02/03/2014	50	MOTION for Summary Judgment *On Issue Of Liability As To Law Firm Defendants* by Plaintiffs Pamela Gillie, Hazel Meadows, Counter Defendants Pamela Gillie, Hazel Meadows. Responses due by 2/27/2014 (Zieg, Michael) (Entered: 02/03/2014)

02/03/2014	51	MOTION for Summary Judgment by Defendants Eric A. Jones, Law Office of Eric A. Jones, LLC. Responses due by 2/27/2014 (Gentry, Boyd) (Entered: 02/03/2014)
02/21/2014	52	RESPONSE in Opposition re 46 MOTION for Judgment on the Pleadings filed by Plaintiffs Pamela Gillie, Hazel Meadows, Counter Defendants Pamela Gillie, Hazel Meadows. (Zieg, Michael) (Entered: 02/21/2014)
02/25/2014	53	Unopposed MOTION for Extension of Time to File Response/Reply as to 49 First MOTION for Summary Judgment New date requested 3/4/2014. *UNOPPOSED MOTION FOR EXTENSION OF TIME OF DEFENDANT SARAH SHERIFF* by Defendant Sarah Sheriff. (Cook, Dale) (Entered: 02/25/2014)
02/27/2014	54	RESPONSE in Opposition re 50 MOTION for Summary Judgment *On Issue Of Liability As To Law Firm Defendants*, 48 MOTION for Summary Judgment *COMBINED MEMORANDUM OF WILIES, BOYLE, BURKHOLDER & BRINGARDNER CO., LPA, MARK SHERIFF AND SARAH SHERIFF IN OPPOSITION TO PLAINTIFFS' MOTION FOR*

SUMMARY JUDGMENT ON SPECIAL COUNSEL [DOC. 48] AND LAW FIRM DEFENDANTS [DOC. 50] filed by Defendants Mark Sheriff, Sarah Sheriff, Wiles, Boyle, Burkholder, & Bringardner Co., LPA. (Cook, Dale) (Entered: 02/27/2014)

02/27/2014 55 RESPONSE in Opposition re 47 MOTION for Summary Judgment filed by Plaintiffs Pamela Gillie, Hazel Meadows. (Zieg, Michael) (Entered: 02/27/2014)

02/27/2014 56 RESPONSE in Opposition re 51 MOTION for Summary Judgment filed by Plaintiffs Pamela Gillie, Hazel Meadows. (Zieg, Michael) (Entered: 02/27/2014)

02/27/2014 57 RESPONSE in Opposition re 50 MOTION for Summary Judgment *On Issue Of Liability As To Law Firm Defendants* filed by Defendants Eric A. Jones, Law Office of Eric A. Jones, LLC. (Gentry, Boyd) (Entered: 02/27/2014)

02/27/2014 58 RESPONSE in Opposition re 48 MOTION for Summary Judgment filed by Defendant Eric A. Jones. (Gentry, Boyd) (Entered: 02/27/2014)

02/27/2014 59 RESPONSE in Opposition re 50

		MOTION for Summary Judgment *On Issue Of Liability As To Law Firm Defendants*, 48 MOTION for Summary Judgment filed by Counter Claimant Ohio Attorney General, Intervenor Defendant Ohio Attorney General. (Conomy, Christopher) (Entered: 02/27/2014)
03/04/2014	60	RESPONSE in Opposition re 49 First MOTION for Summary Judgment *MEMORANDUM OF SARAH SHERIFF IN OPPOSITION TO PLAINTIFF HAZEL MEADOWS' MOTION FOR SUMMARY JUDGMENT [DOC. #49]* filed by Defendant Sarah Sheriff. (Attachments: # 1 Exhibit 1 Affidavit of Sarah Sheriff, # 2 Exhibit 2 Affidavit of Mark Sheriff) (Cook, Dale) (Entered: 03/04/2014)
03/13/2014	61	REPLY to Response to Motion re 47 MOTION for Summary Judgment *REPLY MEMORANDUM OF MARK SHERIFF, SARAH SHERIFF AND WBBB IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT [DOC. #47]* filed by Defendants Mark Sheriff, Sarah Sheriff, Wiles, Boyle, Burkholder, & Bringardner Co., LPA. (Cook, Dale) (Entered: 03/13/2014)

03/13/2014	62	REPLY to Response to Motion re 51 MOTION for Summary Judgment filed by Defendants Eric A. Jones, Law Office of Eric A. Jones, LLC. (Gentry, Boyd) (Entered: 03/13/2014)
03/14/2014	63	REPLY to Response to Motion re 50 MOTION for Summary Judgment *On Issue Of Liability As To Law Firm Defendants*, 48 MOTION for Summary Judgment *Pertaining To Special Counsel* filed by Plaintiffs Pamela Gillie, Hazel Meadows, Counter Defendants Pamela Gillie, Hazel Meadows. (Zieg, Michael) (Entered: 03/14/2014)
03/16/2014	64	REPLY to Response to Motion re 48 MOTION for Summary Judgment *Pertaining To "Special Counsel"* filed by Plaintiffs Pamela Gillie, Hazel Meadows. (Zieg, Michael) (Entered: 03/16/2014)
03/16/2014	65	REPLY to Response to Motion re 50 MOTION for Summary Judgment *On Issue Of Liability As To Law Firm Defendants* filed by Plaintiffs Pamela Gillie, Hazel Meadows, Counter Defendants Pamela Gillie, Hazel Meadows. (Nobile, James) (Entered: 03/16/2014)
03/16/2014	66	REPLY to Response to Motion re

		50 MOTION for Summary Judgment *On Issue Of Liability As To Law Firm Defendants* filed by Plaintiffs Pamela Gillie, Hazel Meadows, Counter Defendants Pamela Gillie, Hazel Meadows. (Nobile, James) (Entered: 03/16/2014)
03/17/2014	67	REPLY to Response to Motion re 48 MOTION for Summary Judgment filed by Plaintiffs Pamela Gillie, Hazel Meadows. (Willison, Eric) (Entered: 03/17/2014)
03/21/2014	68	REPLY to Response to Motion re 48 MOTION for Summary Judgment filed by Plaintiff Hazel Meadows. (Willison, Eric) (Entered: 03/21/2014)
04/23/2014	69	ORDER. Signed by Judge James L Graham on 4/23/14. (ds) (Entered: 04/23/2014)
05/07/2014	70	MOTION for Summary Judgment by Counter Claimant Ohio Attorney General, Intervenor Defendant Ohio Attorney General. Responses due by 6/2/2014 (Conomy, Christopher) (Entered: 05/07/2014)
05/14/2014	71	RESPONSE in Opposition re 70 MOTION for Summary Judgment *of Intervenor OAG* filed by

		Plaintiffs Pamela Gillie, Hazel Meadows. (Willison, Eric) (Entered: 05/14/2014)
08/12/2014	72	OPINION AND ORDER granting 47 & 51 Motions for Summary Judgment; denying 46 Motion for Judgment on the Pleadings; denying 48 , 49 & 50 Motions for Summary Judgment; denying 70 Motion for Summary Judgment; finding as moot 41 Motion to Dismiss for Failure to State a Claim. Signed by Judge James L Graham on 8/12/2014. (er1) (Entered: 08/12/2014)
08/12/2014	73	JUDGMENT. Case Terminated. (ds) (Entered: 08/12/2014)
08/26/2014	74	NOTICE OF APPEAL as to 73 Judgment, 72 Order on Motion to Dismiss for Failure to State a Claim, Order on Motion for Judgment on the Pleadings, Order on Motion for Summary Judgment by Plaintiffs Pamela Gillie, Hazel Meadows, Counter Defendants Pamela Gillie, Hazel Meadows. Filing fee $ 505, receipt number 0648-4702104. Appeal Record due by 9/9/2014. (Nobile, James) (Entered: 08/26/2014)
08/26/2014		USCA Case Number 14-3836 for 74 Notice of Appeal, filed by Pamela Gillie, Hazel Meadows. Case

		Manager Beverly Harris. (sct1) (Entered: 08/27/2014)
12/15/2014	75	ORDER of USCA as to 74 Notice of Appeal, filed by Pamela Gillie, Hazel Meadows granting in part and denying in part the motion to reconsider. (sct1) (Entered: 12/16/2014)
05/11/2015	76	USCA JUDGMENT as to 74 Notice of Appeal: The Sixth Circuit ORDERS that summary judgment in favor of Defendants be VACATED, and the case be REMANDED to the District Court for further proceedings consistent with the opinion of this court. **Note: Mandate to issue.** (er) (Entered: 05/11/2015)
07/22/2015	77	ORDER of USCA as to 74 Notice of Appeal, filed by Pamela Gillie, Hazel Meadows to Stay the Mandate. **Note: No Mandate details noted.** (sct) (Entered: 07/23/2015)
09/23/2015	78	Notice from Supreme Court of the United States. The petition for a writ of certiorari was filed on 9/15/15 and placed on the docket on 9/17/15 as case number 15-338. (pb) (Entered: 09/23/2015)
11/19/2015	79	Notice from Supreme Court of the United States. The petition for a

		writ of certiorari was filed on 10/07/15 and placed on the docket on 11/13/15 as case number 15-620. (pb) (Entered: 11/19/2015)
12/21/2015	80	US SUPREME COURT ORDER of The Court today entered the following order in the above-entitled case: The petition for a writ of certiorari is granted as to 74 Notice of Appeal, filed by Pamela Gillie, Hazel Meadows **Note: No Mandate details noted.** (pb) (Entered: 12/21/2015)

Doc. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No.: 2:13-CV-212
Judge:
Magistrate:
Class Action Complaint
Filed: March 5, 2013

Pamela Gillie
2392 Rosecrest Street
Columbus, Ohio 43123-8464

And

Hazel Meadows
587 South Harris Avenue
Columbus, Ohio 43204

On Behalf of Themselves and Others
Similarly Situated

Plaintiffs,

v.

Law Office of Eric A. Jones, LLC
c/o statutory agent for service of process
Eric A. Jones
2668 Welsford Road
Upper Arlington, Ohio 43221

And

Eric A. Jones
2668 Welsford Road
Upper Arlington, Ohio 43221

And

Wiles, Boyle, Burkholder & Bringardner Co., L.P.A.
c/o statutory agent for service of process
Kerry T. Boyle
300 Spruce Street Ste. 100
Columbus, Ohio 43215

And

Mark Sheriff
2330 Sandover Road
Upper Arlington, Ohio 43220

And

Sarah Sheriff
300 Spruce Street Ste. 100
Columbus, Ohio 43215

And

All Other "To-Be-Named" Defendants
Similarly Situated (see infra, ¶¶ 34-40, 112)

Defendants.

COMPLAINT FOR DAMAGES WITH CLASS ACTION RELIEF

Now come Plaintiffs Pamela Gillie and Hazel Meadows, by and through counsel, individually and on behalf of all others similarly situated, and based on their own knowledge, information, and belief, formed after inquiry reasonable under the circumstances, state:

INTRODUCTION

1. The Ohio Attorney General is the chief law officer for the State of Ohio.

2. Pursuant to R.C. 131.02, The Ohio Attorney General serves as legal counsel and the collector of past due debts owed to Ohio's various state agencies, boards, departments, commissions, colleges, universities, political subdivisions and retirement systems ("State Clients").

3. R.C. 109.08 gives The Ohio Attorney General the authority to engage "special counsel" to represent the state in connection with all claims of whatsoever nature which are certified to the Attorney General for collection under any law or which the Attorney General is authorized to collect.

4. This litigation concerns those collection claims that would be defined as "debts" within the meaning of 15 U.S.C. § 1692a(5).

5. "Special counsel" who are engaged by the Ohio Attorney General pursuant to R.C. 109.08 are required to sign a "Retention Agreement" with the Attorney General.

6. R.C. 109.08 states that the Ohio Attorney General shall provide "special counsel" with the official letterhead stationary of the Attorney General, but only in connection with the collection of certain specified tax claims.

7. The Ohio Attorney General requires "special counsel" to use the official letterhead stationary of the Ohio Attorney General in all dunning letters "special counsel" prepare and send to collect upon debts owed to State Clients, including non-tax debts.

8. Some or all of the debts collected on behalf of the Attorney General by the Defendants named in this action are consumer "debts" as defined by 15 U.S.C. § 1692a(5).

9. Defendants named in this action routinely use the official letterhead stationary of the Ohio Attorney General when collecting consumer debts.

10. Defendants' use of the Ohio Attorney General's letterhead when collecting consumer debts violates the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, *et seq.*

JURISDICTION AND VENUE

11. This Court has jurisdiction under 28 U.S.C. § 1331 because this action arises under the federal laws of the United States.

12. Venue is appropriate because the acts and transactions occurred here and Plaintiffs Pamela Gillie and Hazel Meadows both reside here.

THE PARTIES

13. Plaintiff Pamela Gillie resides in Columbus, Ohio.

14. Plaintiff Hazel Meadows resides in Columbus, Ohio.

15. Plaintiff Gillie is a "consumer" as that term is defined by 15 U.S.C. § 1692a(3).

16. Plaintiff Meadows is a "consumer" as that term is defined by 15 U.S.C. § 1692a(3).

17. The putative Plaintiff class members are "consumers" as that term is defined by 15 U.S.C. § 1692a(3).

18. Plaintiffs Gillie and Meadows and the putative Plaintiff class members received, on and/or after March 5, 2012, at least one dunning letter from at least one of the Defendants, written on the official

letterhead stationary of the Ohio Attorney General, attempting to collect a consumer debt.

19. Defendants in this suit are comprised of individuals and entities engaged in the business of collecting consumer debts in the state of Ohio, and as such, are "debt collectors" as that term is defined by 15 U.S.C. § 1692a(6).

20. Defendants are further defined as follows:

a. Defendant Individuals – individual attorneys who are engaged by the Ohio Attorney General as "special counsel," have executed a Retention Agreement with the Attorney General, and are named in the Retention Agreement as "special counsel;"

b. Defendant Entities – Ohio entities, formed as corporations, LLCs, LLPs, general partnerships, or other business associations, to which "special counsel" belong as owners, partners, associates, of counsel, or otherwise; and

c. Defendant Others – individuals who provide services to Defendant Individuals and/or Defendant Entities and assist with collection efforts as attorneys, partners, paralegals, secretaries, assistants, or other designated associates.

21. Defendant Entities and Defendant Others are not "special counsel" as defined by the Retention Agreements signed between "special counsel" and the Ohio Attorney General.

22. Significant portions of the Defendants' business practices involve the collection of consumer debts

using the United States Mail and telephone service (via fax).

23. Each Defendant has a true business, company, or organization name that they use when conducting debt collection activities.

24. Defendant Individuals signed one-year "Retention Agreements" for fiscal year 2012 and/or fiscal year 2013 with the Ohio Attorney General, defining their relationship as "special counsel."

25. A true and accurate blank copy of the "Retention Agreement" for fiscal year 2012, signed by Defendant Individuals acting as "special counsel" from July 1, 2011 to June 30, 2012, is attached hereto as Exhibit A.

26. A true and accurate blank copy of the "Retention Agreement" for fiscal year 2013, signed by Defendant Individuals acting as "special counsel" from July 1, 2012 to June 30, 2013, is attached hereto as Exhibit B.

27. Said "Retention Agreements" explicitly define Defendant Individuals as "independent contractors" of the Ohio Attorney General.

28. Said "Retention Agreements" explicitly state that "special counsel" shall not be regarded as "in the employment of," or "as an employee of," the Attorney General or any State Client.

29. Defendant Individuals, in their role as "special counsel" pursuant to R.C. 109.08, are "independent contractors" of the Ohio Attorney General.

30. Defendant Individuals are neither officers nor employees of the State of Ohio for the purposes of 15 U.S.C. § 1692a(6)(C).

31. Defendant Entities and Defendant Others are neither officers nor employees of the State of Ohio for the purposes of 15 U.S.C. § 1692a(6)(C).

32. Defendants, when pursuing collection activities on behalf of the Ohio Attorney General, are "debt collectors" as defined by 15 U.S.C. § 1692a(6).

33. Defendants use their own true business, company, or organization name in the collection letters they send on the Ohio Attorney General letterhead, in addition to the name of the Ohio Attorney General.

34. Upon belief based on information received from the Ohio Attorney General, there are 96 other "special counsel" not yet named as defendants in this suit who signed Retention Agreements for fiscal year 2012 and/or fiscal year 2013.

35. Upon belief based on information received from the Ohio Attorney General, a significant number of the 96 other "special counsel" not yet named as defendants in this suit have used, and continue to use, the official letterhead stationary of the Ohio Attorney General to collect consumer "debts" as defined by 15 U.S.C. § 1692a(5).

36. At all times relevant to this case, the Ohio Attorney General has maintained a uniform policy requiring all "special counsel"[1] to use the Attorney General's official letterhead stationary when

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[1] One "Special Counsel," Robert Schuerger, requested and received permission, at some unknown time in the past, to use his own letterhead.

collecting both tax and non-tax debts certified to the Attorney General.

37. The dispute in this case arises from "Special counsel's" use of the official letterhead stationary of the Ohio Attorney General.

38. The Ohio Attorney General's uniform mandate requiring that "special counsel" use the official AG letterhead stationary, said use being the underlying cause of this dispute, has created an instance in which certain "special counsel" not yet named in this suit are juridically related in a manner that suggests including them into a single resolution of the dispute would be expeditious.

39. Plaintiffs intend, pursuant to proper rules for procedure and discovery, to determine which of the 96 other "special counsel" share sufficient juridical links with the Defendants currently named in this case, such that adding them as named defendants is appropriate and will promote judicial economy.

40. Accordingly, Plaintiffs intend, where appropriate given sufficient juridical links, to add such "to-be-named" defendants by amendment to this complaint.

FACTUAL ALLEGATIONS

41. On May 24, 2012, Defendants Eric A. Jones and Law Office of Eric A. Jones, LLC sent, through the U.S. Mail, a dunning letter to Plaintiff Gillie (hereinafter, "Gillie Letter").

42. A true and accurate copy of the Gillie Letter is attached hereto as Exhibit C.

43. Defendant Eric A. Jones sent the Gillie Letter in his role as "special counsel" to the Ohio Attorney General.

44. Plaintiff Gillie received this letter within a few days, and reviewed its contents.

45. The Gillie Letter was written on the official letterhead stationary of the Ohio Attorney General.

46. The Ohio Attorney General is a law enforcement officer of the State of Ohio.

47 The Ohio Attorney General has the power and discretion to implement criminal and civil proceedings against persons in Ohio.

48. The power of the Ohio Attorney General's Office to bring criminal and civil prosecutions is known to most persons in the State of Ohio.

49. Plaintiff Gillie, upon seeing the Ohio Attorney General's logo, was alarmed that this law enforcement office was contacting her about a debt she allegedly owed.

50. Upon further inspection, Plaintiff Gillie noticed that the envelope containing the letter had the return name and address of Law Office of Eric A. Jones, L.L.C.

51. "Law Office of Eric A. Jones, L.L.C." is the true name of Defendant Jones' business, company, or organization.

52. Upon further inspection, Plaintiff Gillie noticed that the letter was signed by Eric A. Jones, and requested that she send payment to Law Office of Eric A. Jones, LLC for a certain "medical claim."

53. The letter further instructed Plaintiff Gillie to "call Denise Hall at Eric A. Jones, L.L.C.... at my office to make arrangements to pay this debt."

54. Plaintiff Gillie was confused as to the actual source of the letter.

55. Plaintiff Gillie was misled as to the actual source of the letter.

56. Plaintiff Gillie was uncertain whether the letter was legitimate given the fact it had the multiple names of "Eric A. Jones", "Law Office of Eric A. Jones, L.L.C.", and "Mike DeWine Ohio Attorney General"

57. The signature block of the Gillie Letter identified the sender, Defendant Jones, as "outside counsel" to the Ohio Attorney General.

58. No explanation was given as to what "outside counsel" means.

59. The Gillie Letter further stated that Plaintiff Gillie owed $2,227.46 for a "medical claim."

60. Debts incurred from medical treatment are consumer "debts" as defined by 15 U.S.C. § 1692a(5).

61. On July 20, 2012, Defendants Sarah Sheriff and Wiles, Boyle Burkholder & Bringardner Co., LPA sent, through the U.S. Mail, a letter to Plaintiff Meadows. (hereinafter, "Meadows Letter").

62. Defendant Mark Sherriff caused the Meadows Letter to be sent in his role as "special counsel" to the Ohio Attorney General.

63. Plaintiff Meadows received this letter within a few days, and reviewed its contents.

64. The Meadows Letter was written on the official letterhead stationary of the Ohio Attorney General.

65. Upon information and belief, Plaintiff Meadows had received at least one prior dunning letter from Defendants Mark Sheriff, Sarah Sheriff and Wiles Boyle Burkholder & Bringardner Co., LPA written on the Ohio Attorney General's letterhead.

66. Plaintiff Meadows, upon seeing the Ohio Attorney General's logo in the Meadows Letter, was alarmed that she was being contacted by the Ohio Attorney General's office.

67 Upon further inspection, Plaintiff Meadows noticed that the envelope containing the letter had the return name and address of Wiles, Boyle, Burkholder & Bringardner Co., LPA.

68. "Wiles, Boyle, Burkholder & Bringardner Co., LPA" is the true name of Defendants Mark and Sarah Sherriff's business, company, or organization.

69. The letter stated that it was sent concerning a balance owed for a University of Akron loan that had been placed with the Ohio Attorney General.

70. The letter was signed by Sarah Sheriff, Wiles, Boyle, Burkholder & Bringardner Co., LPA, Special Counsel to the Attorney General for the State of Ohio.

71. Plaintiff Meadows was confused as to whether the actual source of the letter was The Ohio Attorney General or the Wiles firm.

72. Plaintiff Meadows was misled as to the actual source of the letter.

73. Plaintiff Meadows was uncertain about the letter's legitimacy given the fact it had the multiple names of "Sarah Sheriff," "Wiles, Boyle, Burkholder & Bringardner Co., LPA," and "Office of the Ohio Attorney General Collections Enforcement Section."

74. The signature block of the Meadows Letter identified the senders, Defendants Sarah Sheriff and Wiles, Boyle, Burkholder & Bringardner Co., LPA as "special counsel" to the Attorney General for the State of Ohio.

75. Plaintiff Meadows was confused whether Defendants Sarah Sheriff and/or Wiles, Boyle, Burkholder & Bringardner Co., LPA were actually a part of the Attorney General's Office.

76. No explanation was given as to what "special counsel" means.

77. Neither Sarah Sheriff nor Wiles, Boyle, Burkholder & Bringardner Co., LPA are "special counsel" to the Ohio Attorney General.

78. Sarah Sheriff was not and is not an attorney at law licensed with the State of Ohio.

79. The Meadows Letter further stated that Plaintiff Meadows owed $2,581.07 for a university loan.

80. Debts incurred from university education are consumer "debts" as defined by 15 U.S.C. § 1692a(5).

81. The use of the Ohio Attorney General's letterhead strongly implies to debtors receiving such letters, including but not limited to Plaintiffs Gillie and Meadows, that the letters are prepared by and sent from the Ohio Attorney General when such is not the case.

82. Said letters are prepared, compiled, and sent by the Defendant Individuals, Defendant Entities, and/or Defendant Others, from their own office.

83. The use of the Ohio Attorney General's letterhead strongly implies to debtors receiving such letters, including but not limited to Plaintiffs Gillie and Meadows, that the Ohio Attorney General and/or his office controls and supervises the process through which the individual letters are prepared and sent when such is not the case.

84. Defendant Individuals operate as independent contractors and supervise the process through which the letters are prepared and sent from their own office.

85. The Ohio Attorney General does not control and/or supervise the daily collection activities of Defendant Individuals, Defendant Entities, and Defendant Others, including Defendants' preparation and sending of individual collection letters.

86. The use of the Ohio Attorney General's letterhead strongly implies to debtors receiving such letters, including but not limited to Plaintiffs Gillie and Meadows, that the Ohio Attorney General and/or his office was and is substantially involved in Defendants' daily collection activities when such is not the case.

87. The Ohio Attorney General and/or his office is not substantially involved in Defendants' daily collection activities, which occur at Defendants' offices.

88. The actions of Defendants Eric A. Jones and Law Office of Eric A. Jones, LLC, in their preparation and sending of the Gillie Letter, violate

the FDCPA, specifically 15 U.S.C. 1692(e)(1), (9), (10) and (14).

89. Upon information and belief, on or after March 5, 2012, Defendants Eric A. Jones and Law Office of Eric A. Jones, LLC have sent multiple other letters, similar to the Gillie Letter, to putative Plaintiff class members, each in violation of the FDCPA, specifically 15 U.S.C. 1692(e)(1), (9), (10) and (14).

90. The actions of Defendants Mark Sheriff, Sarah Sheriff, and Wiles, Boyle, Burkholder & Bringardner Co., LPA, in their preparation and sending of the Meadows Letter, violate the FDCPA, specifically 15 U.S.C. 1692(e)(1), (9), (10) and (14).

91. Upon information and belief, on or after March 5, 2012, Defendants Mark Sheriff, Sarah Sheriff, and Wiles, Boyle, Burkholder & Bringardner Co., LPA have sent multiple other letters, similar to the Meadows Letter, to putative Plaintiff class members, each in violation of the FDCPA, specifically 15 U.S.C. 1692(e)(1), (9), (10) and (14).

CLASS ACTION ALLEGATIONS

92. This action is properly maintainable as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

93. The putative Plaintiff class consists of the following persons: every consumer who received a dunning letter from one or more of the Defendants, on or after March 5, 2012, which was printed on the official letterhead stationary of the Ohio Attorney General and which was attempting to collect a consumer debt owed to Ohio's various state agencies, boards, departments, commissions, colleges,

universities, political subdivisions and retirement systems, and/or the state of Ohio.

94. Members of the class are so numerous that joinder is impractical.

95. As of December 31, 2012, the Ohio Attorney General had 791,150 non-tax collection accounts assigned to "special counsel," with a total balance of $13,189,745,245.37

96. Plaintiffs estimate that members of the putative class are in the tens of thousands, possibly hundreds of thousands.

97. Plaintiffs Gillie and Meadows will assure the adequate representation of all members of the class and have no conflict with class members in the maintenance of this action.

98. Plaintiffs Gillie's and Meadows' interests in this action are typical of the class, and the Gillie and Meadows Letters do not differ in any significant way from the letters received by other class Plaintiffs.

99. Plaintiffs Gillie's and Meadows' interests in this action are antagonistic to the interests of the Defendants.

100. Plaintiffs Gillie and Meadows have no interest in, or relationship with, any Defendant that would prevent them from litigating this matter fully and on behalf of the class.

101. Plaintiffs Gillie and Meadows are aware that settlement of the class action is subject to court approval.

102. Plaintiffs Gillie and Meadows will vigorously pursue the class claims throughout the course of this action.

103. A class action will provide a fair and efficient means to adjudicate this controversy since the claims of the class members are virtually identical, raising the same questions of law and involving substantially the same methods of collection by the Defendants.

104. Most if not all facts needed to determine damages are obtainable from the records of the Defendants and the Ohio Attorney General.

105. The purposes of the FDCPA will be best effectuated by a class action.

106. A class action is superior to other methods for the fair and efficient adjudication of this controversy.

107. Because the damages suffered by most members of the class are relatively small in relation to the costs, expense, and burden of this litigation, it would be difficult for members of the class to individually redress the wrongs done to them.

108. Many, if not all of the class members are unaware that claims exist against the Defendants.

109. Because many class members are unaware of their claims and because their claims are small in relation to the cost of an individual suit, a class action is the only proceeding in which class members can, as a practical matter, recover.

110. There will be no unusual difficulty in the management of this action as a class action.

111. Several common questions of law predominate over all matters in this action.

112. Among the common questions are: 1) Did the Defendants misrepresent themselves as being vouched for, bonded by, or affiliated with the Ohio Attorney General's Office via the use of the Ohio Attorney General's letterhead in the collection of consumer debts?; 2) Did the Defendants, through the use of the Ohio Attorney General's letterhead in their collection letters, distribute written communications which simulated or falsely represented that the documents were authorized, issued, or approved by an official of the State of Ohio, to wit, the Attorney General, or create a false impression as to its source, authorization or approval?; 3) Did the Defendants, through their use of the Ohio Attorney General's letterhead, make use of any false representation or deceptive means to collect any debt?; 4) Did the Defendants, through their use of the Ohio Attorney General's letterhead, use any business, company, or organization name other than the true name of their business, company, or organization?; 5) Is the use of the Ohio Attorney General's letterhead by the Defendants confusing and/or misleading to debtors receiving such letters?

113. The same common questions equally apply to similarly situated defendants not yet named in this suit, but juridically linked by being subject to the same mandate from the Ohio Attorney General to use the official letterhead stationary in their dunning letters.

114. Defendants had an obligation to Plaintiffs and the members of the class to comply with the

requirements of the FDCPA, and failed to do so in the following ways:

a. Using a "least sophisticated consumer standard", the Gillie and Meadows Letters, and similar letters sent by Defendants on the Ohio Attorney General's letterhead, created the false impression that they came directly from a law enforcement officer, to wit: the State of Ohio Attorney General, instead of coming directly from the Defendants.

b. Using a "least sophisticated consumer standard", the Gillie and Meadows Letters, and similar letters sent by Defendants on the Ohio Attorney General's letterhead, created confusion as to the source of the letters.

c. The sheer prominence of the typeset related to, and the use of the Ohio Attorney General's name and seal, as compared to the lesser typeset dedicated to the Defendants' information, gave the false impression that the Ohio Attorney General is the source of the letters.

d. The sheer prominence of the typeset related to, and the use of the Ohio Attorney General's name and seal, as compared to the lesser typeset dedicated to the Defendants' information, gave the false impression that Defendants are themselves attorneys employed by the State of Ohio for the purpose of collecting such debts.

e. Defendants' use, in their collection letters, of both their own true name and the Ohio Attorney General's name constituted the use

of a name other than the true name of Defendants' business, company, or organization.

First Claim for Relief: Violation of the FDCPA, 15 U.S.C. § 1692(e)(1)

115. Plaintiffs restate all of the foregoing allegations in this Complaint as if fully restated herein.

116. Defendants are "debt collectors" within the meaning of 15 U.S.C. § 1692a(6).

117. Plaintiffs are consumers within the meaning of 15 U.S.C. § 1692a(3).

118. The amount sought to be collected in the Gillie Letter by Defendants Eric Jones and The Law Offices of Eric A. Jones, LLC is a "debt" within the meaning of 15 U.S.C. § 1692a(5).

119. The amounts sought to be collected, in other similar dunning letters that were sent to putative Plaintiffs by Defendants Eric Jones and The Law Offices of Eric A. Jones, LLC, are "debts" within the meaning of 15 U.S.C. § 1692a(5).

120. The amount sought to be collected in the Meadows Letter by Defendants Mark Sheriff, Sarah Sheriff, and Wiles, Boyle, Burkholder & Bringardner Co., LPA is a "debt" within the meaning of 15 U.S.C. § 1692a(5).

121. The amounts sought to be collected, in other similar dunning letters that were sent to putative Plaintiffs by Defendants Mark Sheriff, Sarah Sheriff, and Wiles, Boyle, Burkholder & Bringardner Co., LPA, are "debts" within the meaning of 15 U.S.C. § 1692a(5).

122. Upon information and belief, the amounts sought to be collected, in letters similar to the Gillie and Meadows Letters sent by other similarly situated Defendants as described in the caption to this complaint, are "debts" within the meaning of 15 U.S.C. § 1692a(5).

123. Upon information and belief, Defendants have violated 15 U.S.C. § 1692(e)(1) by sending out dunning letters to the Plaintiffs and putative Plaintiff class members, which letters, via the use of the Ohio Attorney General's letterhead, falsely represent or imply that Defendants are vouched for, bonded by, or affiliated with the Ohio Attorney General.

124. Defendants' violations of 15 U.S.C. § 1692(e)(1) entitle Plaintiffs Gillie and Meadows, and the rest of the putative Plaintiff class, to the remedies set forth in 15 U.S.C. § 1692(k).

Second Claim For Relief: Violation of the FDCPA, 15 U.S.C. § 1692(e)(9)

125. Plaintiffs restate all of the foregoing allegations in this Complaint as if fully restated herein.

126. Upon information and belief, Defendants have violated 15 U.S.C. § 1692(e)(9) by sending out dunning letters to the Plaintiffs and putative Plaintiff class members, which letters, via the use of the Ohio Attorney General's letterhead, simulate or are falsely represented to be documents authorized, issued, or approved by the Ohio Attorney General, or which create a false impression that the Ohio Attorney General is the source of the letters, authorized the letters, or approved the letters.

127. Defendants' violations of 15 U.S.C. § 1692(e)(9) entitle Plaintiffs Gillie and Meadows, and the rest of the putative Plaintiff class, to the remedies set forth in 15 U.S.C. § 1692(k).

Third Claim for Relief: Violation of the FDCPA, 15 U.S.C. § 1692(e)(10)

128. Plaintiffs restate all of the foregoing allegations in this Complaint as if fully restated herein.

129. Upon information and belief, Defendants have violated 15 U.S.C. § 1692(e)(10) by sending out dunning letters to the Plaintiffs and putative Plaintiff class, which letters, via the use of the Ohio Attorney General's letterhead, contain a false representation or deceptive means to collect or attempt to collect a debt, in that they indicate, through the use of the letterhead, that the Ohio Attorney General is the primary party involved in the collection.

130. Defendants' violations of 15 U.S.C. § 1692(e)(10) entitle Plaintiffs Gillie and Meadows, and the rest of the putative Plaintiff class, to the remedies set forth in 15 U.S.C. § 1692(k).

Fourth Claim for Relief: Violation of the FDCPA, 15 U.S.C. § 1692(e)(14)

131. Plaintiffs restate all of the foregoing allegations in this Complaint as if fully restated herein.

132. Upon information and belief, Defendants have violated 15 U.S.C. § 1692(e)(14) by sending out dunning letters to the Plaintiffs and members of the putative Plaintiff class, which letters, via the use of

the Ohio Attorney General's letterhead, use a business, company, or organization name, to wit, the Ohio Attorney General, other than the true name of the Defendants' business, company, or organization.

133. Defendants' violations of 15 U.S.C. § 1692(e)(14) entitle Plaintiffs Gillie and Meadows, and the rest of the putative Plaintiff class, to the remedies set forth in 15 U.S.C. § 1692(k).

Fifth Claim for Relief: Violation of the FDCPA, 15 U.S.C. § 1692(e)(14)

134. Plaintiffs restate all of the foregoing allegations in this Complaint as if fully restated herein.

135. Upon information and belief, in the alternative and assuming arguendo, if "special counsel" are somehow deemed to be state officials, the use of the Defendants' entity names by said entities or Defendant Others, who are clearly not special counsel, together with the name of the Ohio Attorney General, violates 15 U.S.C. § 1692(e)(14), in that said Defendants are using a name other than the true name of their business, company, or organization.

136. Defendants' violations of 15 U.S.C. § 1692(e)(14) entitle Plaintiffs Gillie and Meadows, and the rest of the putative Plaintiff class, to the remedies set forth in 15 U.S.C. § 1692(k).

Wherefore, Plaintiffs Gillie and Meadows pray for the following relief:

A. Certification of the class under Rule 23 of the Federal Rules of Civil Procedure with the named Plaintiffs as class representatives;

B. A declaration that the Defendants have violated the Fair Debt Collection Practices Act through their use of the official letterhead stationary of the Ohio Attorney General in the collection of consumer debts;

C. A judgment entitling Plaintiffs Gillie and Meadows, and all putative Plaintiff class members, upon the claims for relief mentioned in this Complaint, an award in excess of $25,000 pursuant to the remedies set forth in 15 U.S.C. 1692(k);

D. An award to Plaintiffs Gillie and Meadows, and all putative Plaintiff class members, of all other remedies that equitably and reasonably flow from Defendants' breaches of federal and/or state law and the obligations that arise therefrom;

E. An award to Plaintiffs Gillie and Meadows, and all putative Plaintiff class members, their reasonable attorneys fees, costs, disbursements and pre-judgment interest; and

F. An award of such other and further relief that the Court deems just, equitable, and proper, including but not limited to the addition of "to-be-named" similarly situated defendants who are determined, through proper procedure and discovery, to be juridically linked to the current named Defendants, such that adding them is appropriate and will promote expediency and judicial economy.

JURY DEMAND

Plaintiffs Gillie and Meadows hereby demand a jury for all issues triable.

Dated this 5th day of March, 2013.

Respectfully submitted,

/s/Eric E. Willison
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 2:13-CV-212
JUDGE JAMES L. GRAHAM
MAGISTRATE JUDGE ELIZABETH PRESTON DEAVERS
Filed: May 28, 2013

PAMELA GILLIE, et al.,

Plaintiffs,

v.

LAW OFFICE OF ERIC A. JONES, LLC, et al.,

Defendants.

ANSWER OF DEFENDANTS ERIC A. JONES AND LAW OFFICE OF ERIC A. JONES, LLC

Now come Defendants Eric A. Jones and Law Office of Eric A. Jones, LLC (nka Jones Law Group, LLC), by counsel, and provide the following for their Answer to the Complaint:

1. Defendants admit the allegations in paragraph 1 of the Complaint.

2. Defendants admit the allegations in paragraph 2 of the Complaint.

3. Defendants admit the allegations in paragraph 3 of the Complaint.

4.Paragraph 4 of the Complaint is a characterization by Plaintiff about the nature of her Complaint and, as such, does not require an admission or denial.

5.Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 5 of the Complaint, and therefore deny such allegations.

6.Defendants admit to the contents of Ohio Revised Code § 109.08. All other allegations in paragraph 6 of the Complaint are denied.

7.Defendants do not know Plaintiffs' definition of "dunning letter" in paragraph 7 of the Complaint. However, Defendants admit that the Ohio Attorney General requires special or outside counsel appointed to collect debts owed to the State of Ohio to use the official letterhead stationary of the Ohio Attorney General.

8.Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 8 of the Complaint, and therefore deny such allegations.

9.Defendant Eric A. Jones admits using the Ohio Attorney General's letterhead stationary in compliance with applicable law when acting as "special counsel" or outside counsel under the Ohio Revised Code. All other allegations in paragraph 9 of the Complaint are denied.

10. Defendants deny the allegations in paragraph 10 of the Complaint.

11. In response to paragraph 11 of the Complaint, Defendants admit that this Court has subject matter

jurisdiction over this case and denies all other allegations.

12. Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 12 of the Complaint, and therefore deny such allegations.

13. Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 13 of the Complaint, and therefore deny such allegations.

14. Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 14 of the Complaint, and therefore deny such allegations.

15. Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 15 of the Complaint, and therefore deny such allegations.

16. Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 16 of the Complaint, and therefore deny such allegations.

17 Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 17 of the Complaint, and therefore deny such allegations.

18. Defendants do not know Plaintiffs' definition of "dunning letter", and since that term is not defined in federal law Defendants deny the allegations in paragraph 18 of the Complaint.

19. In response to paragraph 19 of the Complaint, Defendants admit that under certain circumstances,

they may fall under the definition of debt collector as defined in 15 U.S.C. 1692a. Defendants are without sufficient information to form a belief as to the truth of the remaining allegations in paragraph 19 of the Complaint, and therefore deny such allegations.

20. Defendants acknowledge Plaintiffs' definitions contained in paragraph 20 of the Complaint and deny the remaining allegations.

21. Defendants deny the allegations in paragraph 21 of the Complaint.

22. In response to paragraph 22 of the Complaint, Defendants admit that, under certain circumstances, they may collect consumer debts and use the United States Mail and telephone service. Defendants are without sufficient information to form a belief as to the truth of the remaining allegations in paragraph 22 of the Complaint, and therefore deny such allegations.

23. Defendants admit that they have a business, company, or organization name that they use when conducting debt collection activities. Defendants are without sufficient information to form a belief as to the truth of the remaining allegations in paragraph 23 of the Complaint, and therefore deny such allegations.

24. In response to paragraph 24 of the Complaint, Defendants admit that Eric A. Jones appointed as special counselor outside counsel to the Ohio Attorney General pursuant to the Ohio Attorney General's statutory authority and that he entered into a contract with the Ohio Attorney General further defining their duties and relationship. Defendants are without sufficient information to

form a belief as to the truth of the remaining allegations in paragraph 24 of the Complaint, and therefore deny such allegations.

25. Defendants are without sufficient information to form a belief as to the truth of the allegations in paragraph 25 of the Complaint, and therefore deny such allegations.

26. Defendants are without sufficient information to form a belief as to the truth of the allegations in paragraph 26 of the Complaint, and therefore deny such allegations.

27. In response to paragraph 27 of the Complaint, Defendants admit that the Exhibits to the Complaint speak for themselves and deny any inconsistent allegations.

28. In response to paragraph 28 of the Complaint, Defendants admit that the Exhibits to the Complaint speak for themselves and deny any inconsistent allegations.

29. Paragraph 29 of the Complaint is a legal conclusion and, as such, does not require an admission or denial. Nonetheless, in response to paragraph 29 of the Complaint, Defendants admit that the exhibits to the Complaint speak for themselves and deny any inconsistent allegation. Further, Defendants state that special or outside counsel's authority to act for the State of Ohio is defined by statute and is not dependent on status as an employee or independent contractor.

30. Defendants deny the allegations in paragraph 30 of the Complaint.

31. Paragraph 31 of the Complaint is a legal conclusion and, as such, does not require an admission or denial.

32. Defendants deny the allegations contained in paragraph 32 of the Complaint.

33. In response to paragraph 33, Defendants admit that Eric A. Jones identifies himself as special counselor outside counsel to the Ohio Attorney General. Eric A. Jones also admits that he uses the Ohio Attorney General's letterhead in circumstances approved by the Ohio Attorney General. Defendants deny any remaining inconsistent allegations.

34. Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 34 of the Complaint, and therefore deny such allegations.

35. Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 35 of the Complaint, and therefore deny such allegations.

36. Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 36 of the Complaint, and therefore deny such allegations.

37. Paragraph 37 of the Complaint is a characterization of the nature of Plaintiffs' claim and, as such, does not require an admission or denial.

38. Defendants deny the allegations in paragraph 38 of the Complaint.

39. Defendants deny the allegations in paragraph 39 of the Complaint.

40. Defendants deny the allegations in paragraph 40 of the Complaint.

41. Defendants do not know Plaintiffs' definition of "dunning letter" in paragraph 41 of the Complaint. However, Defendants admit that the letter attached as Exhibit C to Plaintiffs' Complaint was sent to Plaintiff Gillie.

42. Defendants admit the allegations in paragraph 42 of the Complaint.

43. Defendants admit the allegations in paragraph 43 of the Complaint.

44. Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 44 of the Complaint, and therefore deny such allegations.

45. In response to paragraph 45 of the Complaint, Defendants admit that the Exhibits to the Complaint speak for themselves and deny any inconsistent allegations.

46. Defendants admit the allegations in paragraph 46 of the Complaint.

47. Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 47 of the Complaint, and therefore deny such allegations.

48. Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 48 of the Complaint, and therefore deny such allegations.

49. Defendants are without sufficient information to enable them to admit or deny the allegations in

paragraph 49 of the Complaint, and therefore deny such allegations.

50. Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 50 of the Complaint, and therefore deny such allegations.

51. Defendants denies the allegations in paragraph 51 of the Complaint as the Law Office of Eric A. Jones, LLC amended its name in August of 2012.

52. Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 52 of the Complaint, and therefore deny such allegations.

53. In response to paragraph 53 of the Complaint, Defendants admit that the Exhibits to the Complaint speak for themselves and deny any inconsistent allegations.

54. Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 54 of the Complaint, and therefore deny such allegations.

55. Defendants deny the allegations in paragraph 55 of the Complaint.

56. Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 56 of the Complaint, and therefore deny such allegations.

57. In response to paragraph 57 of the Complaint, Defendants admit that the Exhibits to the Complaint speak for themselves and deny any inconsistent allegations.

58. In response to paragraph 58 of the Complaint, Defendants admit that the Exhibits to the Complaint speak for themselves and deny any inconsistent allegations.

59. In response to paragraph 59 of the Complaint, Defendants admit that the Exhibits to the Complaint speak for themselves and deny any inconsistent allegations.

60. Defendants deny the allegations in paragraph 60 of the Complaint.

61. Defendants are without sufficient information to form a belief as to the truth of the allegations in paragraph 61 of the Complaint, and therefore deny such allegations.

62. Defendants are without sufficient information to form a belief as to the truth of the allegations in paragraph 62 of the Complaint, and therefore deny such allegations.

63. Defendants are without sufficient information to form a belief as to the truth of the allegations in paragraph 63 of the Complaint, and therefore deny such allegations.

64. In response to paragraph 64 of the Complaint, Defendants admit that the Exhibits to the Complaint speak for themselves and deny any inconsistent allegations.

65. Defendants are without sufficient information to form a belief as to the truth of the allegations in paragraph 65 of the Complaint, and therefore deny such allegations.

66. Defendants are without sufficient information to form a belief as to the truth of the allegations in

paragraph 66 of the Complaint, and therefore deny such allegations.

67. Defendants are without sufficient information to form a belief as to the truth of the allegations in paragraph 67 of the Complaint, and therefore deny such allegations.

68. Defendants are without sufficient information to form a belief as to the truth of the allegations in paragraph 68 of the Complaint, and therefore deny such allegations.

69. In response to paragraph 69 of the Complaint, Defendants admit that the Exhibits to the Complaint speak for themselves and deny any inconsistent allegations.

70. In response to paragraph 70 of the Complaint, Defendants admit that the Exhibits to the Complaint speak for themselves and deny any inconsistent allegations.

71. Defendants are without sufficient information to form a belief as to the truth of the allegations in paragraph 71 of the Complaint, and therefore deny such allegations.

72. Defendants are without sufficient information to form a belief as to the truth of the allegations in paragraph 72 of the Complaint, and therefore deny such allegations.

73. Defendants are without sufficient information to form a belief as to the truth of the allegations in paragraph 73 of the Complaint, and therefore deny such allegations.

74. In response to paragraph 74 of the Complaint, Defendants admit that the Exhibits to the Complaint

speak for themselves and deny any inconsistent allegations.

75. Defendants are without sufficient information to form a belief as to the truth of the allegations in paragraph 75 of the Complaint, and therefore deny such allegations.

76. In response to paragraph 76 of the Complaint, Defendants admit that the Exhibits to the Complaint speak for themselves and deny any inconsistent allegations.

77 Defendants are without sufficient information to form a belief as to the truth of the allegations in paragraph 77 of the Complaint, and therefore deny such allegations.

78. Defendants are without sufficient information to form a belief as to the truth of the allegations in paragraph 78 of the Complaint, and therefore deny such allegations.

79. In response to paragraph 79 of the Complaint, Defendants admit that the Exhibits to the Complaint speak for themselves and deny any inconsistent allegations.

80. Defendants deny the allegations in paragraph 80 of the Complaint.

81. Defendants deny the allegations in paragraph 81 of the Complaint.

82. Defendants admit that letters prepared for Eric A. Jones as "outside counsel" or "special counsel" are sent from their office on behalf of Eric A. Jones. Defendants are without sufficient information to form a belief as to the truth of the remaining

allegations in paragraph 82 of the Complaint, and therefore deny such allegations.

83. Defendants deny the allegations in paragraph 83 of the Complaint.

84. Paragraph 84 of the Complaint is a legal conclusion and, as such, does not require an admission or denial. Nonetheless, Defendants admit that they are involved in the supervision of the process through which letters are prepared and sent from their office. Defendants further state that Eric A. Jones's authority to act for the State of Ohio is defined by statute and is not dependent on his status as an employee or independent contractor.

85. Defendants deny the allegations in paragraph 85 of the Complaint.

86. Defendants deny the allegations in paragraph 86 of the Complaint.

87. Defendants deny the allegations in paragraph 87 of the Complaint.

88. Defendants deny the allegations in paragraph 88 of the Complaint.

89. Defendants deny the allegations in paragraph 89 of the Complaint.

90. Defendants deny the allegations in paragraph 90 of the Complaint.

91. Defendants deny the allegations in paragraph 91 of the Complaint.

92. Defendants deny the allegations in paragraph 92 of the Complaint.

93. Defendants deny the allegations in paragraph 93 of the Complaint.

94. Defendants deny the allegations in paragraph 94 of the Complaint.

95. Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 95 of the Complaint, and therefore deny such allegations.

96. Defendants deny the allegations in paragraph 96 of the Complaint.

97. Defendants deny the allegations in paragraph 97 of the Complaint.

98. Defendants deny the allegations in paragraph 9S of the Complaint.

99. Defendants deny the allegations in paragraph 99 of the Complaint.

100. Defendants deny the allegations in paragraph 100 of the Complaint.

101. Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 101 of the Complaint, and therefore deny such allegations.

102. Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 102 of the Complaint, and therefore deny such allegations.

103. Defendants deny the allegations in paragraph 103 of the Complaint.

104. Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 104 of the Complaint, and therefore deny such allegations.

105. Defendants deny the allegations in paragraph 105 of the Complaint.

106. Defendants deny the allegations in paragraph 106 of the Complaint.

107. Defendants deny the allegations in paragraph 107 of the Complaint.

108. Defendants deny the allegations in paragraph 108 of the Complaint.

109. Defendants deny the allegations in paragraph 109 of the Complaint.

110. Defendants deny the allegations in paragraph 110 of the Complaint.

111. Defendants deny the allegations in paragraph 111 of the Complaint.

112. Defendants deny the allegations in paragraph 112 of the Complaint.

113. Defendants deny the allegations in paragraph 113 of the Complaint.

114. Defendants deny the allegations in paragraph 114 of the Complaint and its subsections.

115. Defendants incorporate their responses to paragraphs 1-114 of the Complaint as if fully set forth herein.

116. In response to paragraph 116, Defendants admit that, under certain circumstances, they may fall under the definition of debt collector as defined in 15 U.S.C. 1692a and deny all other allegations. Defendants are without sufficient information to form a belief as to the truth of the remaining allegations in paragraph 116 of the Complaint, and therefore deny such allegations.

117. Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 117 of the Complaint, and therefore deny such allegations.

118. Defendants deny the allegations in paragraph 118 of the Complaint.

119. Defendants do not know Plaintiffs' definition of "dunning letter", and since that term is not defined in federal law Defendants deny the allegations in paragraph 119 of the Complaint.

120. Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 120 of the Complaint, and therefore deny such allegations.

121. Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 121 of the Complaint, and therefore deny such allegations.

122. Defendants are without sufficient information to enable them to admit or deny the allegations in paragraph 122 of the Complaint, and therefore deny such allegations.

123. Defendants deny the allegations in paragraph 123 of the Complaint.

124. Defendants deny the allegations in paragraph 124 of the Complaint.

125. Defendants incorporate their responses to paragraphs 1-124 of the Complaint as if fully set forth herein.

126. Defendants deny the allegations in paragraph 126 of the Complaint.

127. Defendants deny the allegations in paragraph 127 of the Complaint.

128. Defendants incorporate their responses to paragraphs 1-127 of the Complaint as if fully set forth herein.

129. Defendants deny the allegations in paragraph 129 of the Complaint.

130. Defendants deny the allegations in paragraph 130 of the Complaint.

131. Defendants incorporate their responses to paragraphs 1-130 of the Complaint as if fully set forth herein.

132. Defendants deny the allegations in paragraph 132 of the Complaint.

133. Defendants deny the allegations in paragraph 133 of the Complaint.

134. Defendants incorporate their responses to paragraphs 1-133 of the Complaint as if fully set forth herein.

135. Defendants deny the allegations in paragraph 135 of the Complaint.

136. Defendants deny the allegations in paragraph 136 of the Complaint.

137. Defendants deny all allegations in the Complaint not otherwise specifically admitted or denied herein.

ADDITIONAL DEFENSES

1.Any violation of law, which is denied, was the result of a bona fide error notwithstanding the

maintenance of procedures reasonable adopted and/or adapted to avoid such error.

2. Plaintiffs' claims are barred by the Eleventh Amendment, absolute immunity, and/or qualified immunity.

3. Plaintiff Pamela Gillie lacks standing and/or is not the proper party to bring this case because her claims appear to have been (or should have been) part of her bankruptcy estate in Case No. 2:12-bk-50333.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document was served on the following counsel via the Clerk of Court's CM/ECF system on May 28, 2013.

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Boyd W Gentry (0071057)

Doc. 24

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**CASE NO.: 2:13-cv-00212
JUDGE JAMES L. GRAHAM
MAGISTRATE JUDGE ELIZABETH PRESTON DEAVERS
Filed: August 21, 2013**

PAMELA GILLIE, et al.,

Plaintiffs,

v.

LAW OFFICE OF ERIC A. JONES, LLC, et al.,

Defendants.

ANSWER AND COUNTERCLAIM OF INTERVENING DEFENDANT OHIO ATTORNEY GENERAL MICHAEL DEWINE

For his Answer to Plaintiffs' Complaint and Counterclaim m this matter, Intervening Defendant Ohio Attorney General Michael DeWine (the "Attorney General") states as follows:

ANSWER OF INTERVENING DEFENDANT OHIO ATTORNEY GENERAL

1. The Attorney General admits the allegations of ¶ 1 of the Complaint.

2. In response to the allegations of ¶ 2 of the Complaint, the Attorney General admits that his

duties are as prescribed by law and denies the remaining allegations.

3. In response to the allegations of ¶ 3 of the Complaint, the Attorney General admits that his authority is defined by law including numerous sections of the Ohio Revised Code regarding the appointment of individual attorneys to act as Special Counsel, and denies the remaining allegations.

4. The Attorney General admits that Plaintiffs seek certain relief as prayed for in the Complaint and denies the remaining allegations of ¶ 4 of the Complaint.

5. In response to the allegations of ¶ 5 of the Complaint, the Attorney General admits that attorneys appointed as Special Counsel generally sign contracts further defining their duties and relationship with the Attorney General, and denies the remaining allegations.

6. In response to the allegations of ¶ 6 of the Complaint, the Attorney General admits that his duties and authority are as prescribed by law and denies the remaining allegations.

7. In response to the allegations of ¶ 7 of the Complaint, the Attorney General admits that attorneys appointed as Special Counsel to collect debts owed to the State of Ohio are generally required to use official Attorney General letterhead in correspondence with debtors, and denies the remaining allegations.

8. The Attorney General denies the allegations of ¶ 8 of the Complaint.

9. In response to the allegations of ¶ 9 of the Complaint, the Attorney General admits that attorneys appointed as Special Counsel to collect debts owed to the State of Ohio are generally required to use official Attorney General letterhead in correspondence with debtors, and denies the remaining allegations.

10. The Attorney General denies the allegations of ¶ 10 of the Complaint.

11. Paragraph 11 of the Complaint states a legal conclusion to which no response is required. Notwithstanding the foregoing, the Attorney General admits that this action involves federal laws of the United States. The Attorney General denies the remaining allegations of ¶ 11 of the Complaint.

12. Paragraph 12 of the Complaint states a legal conclusion to which no response is required. Notwithstanding the foregoing, the Attorney General denies the remaining allegations of ¶ 12 of the Complaint for lack of knowledge.

13. The Attorney General denies the allegations of ¶ 13 of the Complaint for lack of knowledge.

14. The Attorney General denies the allegations of ¶ 14 of the Complaint for lack of knowledge.

15. The Attorney General denies the allegations of ¶ 15 of the Complaint.

16. The Attorney General denies the allegations of ¶ 16 of the Complaint.

17. The Attorney General denies the allegations of ¶ 17 of the Complaint.

18. In response to the allegations of ¶ 18 of the Complaint, the Attorney General admits that attorneys appointed as Special Counsel to collect debts owed to the State of Ohio are generally required to use official Attorney General letterhead in correspondence with debtors and that Plaintiffs may have received such letters, and denies the remaining allegations.

19. The Attorney General denies the allegations of ¶ 19 of the Complaint.

20. The Attorney General admits that Plaintiffs seek certain relief as prayed for in the Complaint and denies the remaining allegations of ¶ 20 of the Complaint.

21. The Attorney General admits that Plaintiffs seek certain relief as prayed for in the Complaint and denies the remaining allegations of ¶ 21 of the Complaint.

22. The Attorney General denies the allegations of ¶ 22 of the Complaint for lack of knowledge.

23. The Attorney General denies the allegations of ¶ 23 of the Complaint for lack of knowledge.

24. In response to the allegations of ¶ 24 of the Complaint, the Attorney General admits that Eric A. Jones and Mark Sheriff were appointed as Special Counsel pursuant to the Attorney General's statutory authority and that they entered into contracts further defining their duties and relationship with the Attorney General, and denies the remaining allegations.

25. In response to the allegations of ¶ 25 of the Complaint, the Attorney General admits that Exhibit

A to the Complaint is a true and accurate copy of one form of agreement executed generally by Special Counsel appointed for FY 2012, and denies the remaining allegations.

26. In response to the allegations of ¶ 26 of the Complaint, the Attorney General admits that Exhibit B to the Complaint is a true and accurate copy of one form of agreement executed generally by Special Counsel appointed for FY 2013, and denies the remaining allegations.

27. In response to the allegations of ¶ 27 of the Complaint, the Attorney General admits that the Exhibits to the Complaint speak for themselves and denies any inconsistent allegation.

28. In response to the allegations of ¶ 28 of the Complaint, the Attorney General admits that the Exhibits to the Complaint speak for themselves and denies any inconsistent allegation.

29. Paragraph 29 of the Complaint states a legal conclusion to which no response is required. Notwithstanding the foregoing, in response to the allegations of ¶ 29 of the Complaint, the Attorney General admits that the Exhibits to the Complaint speak for themselves and denies any inconsistent allegation. Further answering, that Attorney General states that the authority of Special Counsel to act for the State depends on their appointment pursuant to statute and not on their status as employee or independent contractor.

30. Paragraph 30 of the Complaint states a legal conclusion to which no response is required. Notwithstanding the foregoing, in response to the allegations of ¶ 30 of the Complaint, the Attorney

General states that Special Counsel's status as independent contractors is irrelevant to this action. Further answering, that Attorney General states that the authority of Special Counsel to act for the State depends on their appointment pursuant to statute and not on their status as employee or independent contractor.

31. Paragraph 31 of the Complaint states a legal conclusion to which no response is required. Notwithstanding the foregoing, in response to the allegations of ¶ 31 of the Complaint, the Attorney General states that Special Counsel's status as independent contractors is irrelevant to this action. Further answering, that Attorney General states that the authority of Special Counsel to act for the State depends on their appointment pursuant to statute and not on their status as employee or independent contractor.

32. The Attorney General denies the allegations of ¶ 32 of the Complaint.

33. In response to the allegations of ¶ 33 of the Complaint, the Attorney General admits that Special Counsel generally identify themselves in collections correspondence and use official Attorney General letterhead in correspondence with debtors, and denies any inconsistent allegation.

34. The Attorney General admits that other attorneys appointed as Special Counsel have signed Retention Agreements for fiscal year 2012 and/or fiscal year 2013 and are not named as defendants in this suit. The Attorney General denies the remaining allegations of ¶ 34 of the Complaint.

35. In response to the allegations of ¶ 35 of the Complaint, the Attorney General admits that attorneys appointed as Special Counsel to collect debts owed to the State of Ohio are generally directed to use official Attorney General letterhead in correspondence with debtors, and denies the remaining allegations.

36. In response to the allegations of ¶ 36 of the Complaint, the Attorney General admits that attorneys appointed as Special Counsel to collect debts owed to the State of Ohio are generally required to use official Attorney General letterhead in correspondence with debtors, and that one Special Counsel, Robert Schuerger, requested and received permission, at some unknown time in the past, to use his own letterhead. The Attorney General denies the remaining allegations of ¶36 of the Complaint.

37. The Attorney General admits the allegations of ¶ 37 of the Complaint.

38. The Attorney General denies the allegations of ¶ 38 of the Complaint.

39. The Attorney General denies the allegations of ¶ 39 of the Complaint for lack of knowledge.

40. The Attorney General denies the allegations of ¶ 40 of the Complaint for lack of knowledge.

41. The Attorney General admits the allegations of ¶ 41 of the Complaint.

42. The Attorney General admits the allegations of ¶ 42 of the Complaint.

43. The Attorney General admits the allegations of ¶ 43 of the Complaint.

44. The Attorney General denies the allegations of ¶ 44 of the Complaint for lack of knowledge.

45. The Attorney General admits the allegations of ¶ 45 of the Complaint.

46. In response to the allegations of ¶ 46 of the Complaint, the Attorney General admits that his duties and authority are as prescribed by law and denies any inconsistent allegations.

47. In response to the allegations of ¶ 47 of the Complaint, the Attorney General admits that his duties and authority are as prescribed by law and denies any inconsistent allegations.

48. The Attorney General denies the allegations of ¶ 48 of the Complaint for lack of knowledge.

49. The Attorney General denies the allegations of ¶ 49 of the Complaint for lack of knowledge.

50. The Attorney General denies the allegations of ¶ 50 of the Complaint for lack of knowledge.

51. In response to the allegations of ¶ 51 of the Complaint, the Attorney General admits that Eric A. Jones operates a business known as Law Office of Eric A. Jones, L.L.C., and denies the remaining allegations.

52. The Attorney General denies the allegations of ¶ 52 of the Complaint for lack of knowledge.

53. In response to the allegations of ¶ 53 of the Complaint, the Attorney General admits that the Exhibits to the Complaint speak for themselves and denies any inconsistent allegation.

54. The Attorney General denies the allegations of ¶ 54 of the Complaint for lack of knowledge.

55. The Attorney General denies the allegations of ¶ 55 of the Complaint for lack of knowledge.

56. The Attorney General denies the allegations of ¶ 56 of the Complaint for lack of knowledge.

57 In response to the allegations of ¶ 57 of the Complaint, the Attorney General admits that the Exhibits to the Complaint speak for themselves and denies any inconsistent allegation.

58. In response to the allegations of ¶ 58 of the Complaint, the Attorney General admits that the Exhibits to the Complaint speak for themselves and denies any inconsistent allegation.

59. In response to the allegations of ¶ 59 of the Complaint, the Attorney General admits that the Exhibits to the Complaint speak for themselves and denies any inconsistent allegation.

60. The Attorney General denies the allegations of ¶ 60 of the Complaint.

61. The Attorney General admits the allegations of ¶ 61 of the Complaint.

62. The Attorney General denies the allegations of ¶ 62 of the Complaint for lack of knowledge.

63. The Attorney General denies the allegations of ¶ 63 of the Complaint for lack of knowledge.

64. In response to the allegations of ¶ 64 of the Complaint, the Attorney General admits that the Exhibits to the Complaint speak for themselves and denies any inconsistent allegation.

65. The Attorney General denies the allegations of ¶ 65 of the Complaint for lack of knowledge.

66. The Attorney General denies the allegations of ¶ 66 of the Complaint for lack of knowledge.

67. The Attorney General denies the allegations of ¶ 67 of the Complaint for lack of knowledge.

68. The Attorney General denies the allegations of ¶ 68 of the Complaint for lack of knowledge.

69. In response to the allegations of ¶ 69 of the Complaint, the Attorney General admits that the Exhibits to the Complaint speak for themselves and denies any inconsistent allegation.

70. In response to the allegations of ¶ 70 of the Complaint, the Attorney General admits that the Exhibits to the Complaint speak for themselves and denies any inconsistent allegation.

71. The Attorney General denies the allegations of ¶ 71 of the Complaint for lack of knowledge.

72. The Attorney General denies the allegations of ¶ 72 of the Complaint.

73. The Attorney General denies the allegations of ¶ 73 of the Complaint for lack of knowledge.

74. In response to the allegations of ¶ 74 of the Complaint, the Attorney General admits that the Exhibits to the Complaint speak for themselves and denies any inconsistent allegation.

75. The Attorney General denies the allegations of ¶ 75 of the Complaint for lack of knowledge.

76. In response to the allegations of ¶ 76 of the Complaint, the Attorney General admits that the Exhibits to the Complaint speak for themselves and denies any inconsistent allegation.

77. The Attorney General admits the allegations of ¶ 77 of the Complaint.

78. The Attorney General admits the allegations of ¶ 78 of the Complaint.

79. In response to the allegations of ¶ 79 of the Complaint, the Attorney General admits that the Exhibits to the Complaint speak for themselves and denies any inconsistent allegation.

80. The Attorney General denies the allegations of ¶ 80 of the Complaint.

81. In response to the allegations of ¶ 81 of the Complaint, the Attorney General admits that the Exhibits to the Complaint speak for themselves and denies any inconsistent allegation.

82. The Attorney General denies the allegations of ¶ 82 of the Complaint for lack of knowledge.

83. In response to the allegations of ¶ 83 of the Complaint, the Attorney General admits that the Exhibits to the Complaint speak for themselves and denies any inconsistent allegation.

84. Paragraph 84 of the Complaint states a legal conclusion to which no response is required. Notwithstanding the foregoing, the Attorney General admits that during their retention as Special Counsel, Defendant Individuals supervise the process through which collection letters are prepared and sent from their own offices. Further answering, that Attorney General states that the authority of Special Counsel to act for the State depends on their appointment pursuant to statute and not on their status as employee or independent contractor.

85. The Attorney General denies the allegations of ¶ 85 of the Complaint.

86. The Attorney General denies the allegations of ¶ 86 of the Complaint.

87. The Attorney General denies the allegations of ¶ 87 of the Complaint.

88. The Attorney General denies the allegations of ¶ 88 of the Complaint.

89. The Attorney General denies the allegations of ¶ 89 of the Complaint.

90. The Attorney General denies the allegations of ¶ 90 of the Complaint.

91. The Attorney General denies the allegations of ¶ 91 of the Complaint.

92. The Attorney General denies the allegations of ¶ 92 of the Complaint for lack of knowledge.

93. The Attorney General admits that Plaintiffs seek certain relief as prayed for in the Complaint and denies the remaining allegations of ¶ 93 of the Complaint.

94. The Attorney General denies the allegations of ¶ 94 of the Complaint for lack of knowledge.

95. The Attorney General admits the allegations of ¶ 95 of the Complaint.

96. The Attorney General denies the allegations of ¶ 96 of the Complaint for lack of knowledge.

97 The Attorney General denies the allegations of ¶ 97 of the Complaint for lack of knowledge.

98. The Attorney General denies the allegations of ¶ 98 of the Complaint for lack of knowledge.

99. The Attorney General denies the allegations of ¶ 99 of the Complaint for lack of knowledge.

100. The Attorney General denies the allegations of ¶ 100 of the Complaint for lack of knowledge.

101. The Attorney General denies the allegations of ¶ 101 of the Complaint for lack of knowledge.

102. The Attorney General denies the allegations of ¶ 102 of the Complaint for lack of knowledge.

103. The Attorney General denies the allegations of ¶ 103 of the Complaint for lack of knowledge.

104. The Attorney General denies the allegations of ¶ 104 of the Complaint for lack of knowledge.

105. The Attorney General denies the allegations of ¶ 105 of the Complaint.

106. The Attorney General denies the allegations of ¶ 106 of the Complaint.

107. The Attorney General denies the allegations of ¶ 107 of the Complaint because there is no wrong to redress in this case.

108. The Attorney General denies the allegations of ¶ 108 of the Complaint for lack of knowledge.

109. The Attorney General denies the allegations of ¶ 109 of the Complaint because no recovery is available to any plaintiff under the facts alleged in this case.

110. The Attorney General denies the allegations of ¶ 110 of the Complaint for lack of knowledge.

111. The Attorney General denies the allegations of ¶ 111 of the Complaint for lack of knowledge.

112. The Attorney General admits that Plaintiffs seek certain relief as prayed for in the Complaint and denies the remaining allegations of ¶ 112 of the Complaint.

113. The Attorney General admits that Plaintiffs seek certain relief as prayed for in the Complaint and denies the remaining allegations of ¶ 113 of the Complaint.

114. The Attorney General denies the allegations of ¶ 114 of the Complaint.

115. In response to the allegations of ¶ 115 of the Complaint, the Attorney General realleges and reincorporates the foregoing responses.

116. The Attorney General denies the allegations of ¶ 116 of the Complaint.

117. The Attorney General denies the allegations of ¶ 117 of the Complaint.

118. The Attorney General denies the allegations of ¶ 118 of the Complaint.

119. The Attorney General denies the allegations of ¶ 119 of the Complaint.

120. The Attorney General denies the allegations of ¶ 120 of the Complaint.

121. The Attorney General denies the allegations of ¶ 121 of the Complaint.

122. The Attorney General denies the allegations of ¶ 122 of the Complaint.

123. The Attorney General denies the allegations of ¶ 123 of the Complaint.

124. The Attorney General denies the allegations of ¶ 124 of the Complaint.

125. In response to the allegations of ¶ 125 of the Complaint, the Attorney General realleges and reincorporates the foregoing responses.

126. The Attorney General denies the allegations of ¶ 126 of the Complaint.

127. The Attorney General denies the allegations of ¶ 127 of the Complaint.

128. In response to the allegations of ¶ 128 of the Complaint, the Attorney General realleges and reincorporates the foregoing responses.

129. The Attorney General denies the allegations of ¶ 129 of the Complaint.

130. The Attorney General denies the allegations of ¶ 130 of the Complaint.

131. In response to the allegations of ¶ 131 of the Complaint, the Attorney General realleges and reincorporates the foregoing responses.

132. The Attorney General denies the allegations of ¶ 132 of the Complaint.

133. The Attorney General denies the allegations of ¶ 133 of the Complaint.

134. In response to the allegations of ¶ 134 of the Complaint, the Attorney General realleges and reincorporates the foregoing responses.

135. The Attorney General denies the allegations of ¶ 135 of the Complaint.

136. The Attorney General denies the allegations of ¶ 136 of the Complaint.

WHEREFORE, Defendant Attorney General Michael DeWine, having fully answered, respectfully requests that the Plaintiffs' Complaint be dismissed and for such other relief as may be appropriate.

COUNTERCLAIM OF INTERVENING DEFENDANT OHIO ATTORNEY GENERAL

1. Ohio Attorney General Michael DeWine (the "Attorney General") is the chief law officer for the State of Ohio.

2. The Attorney General's duties include pursuing the collection of debts owed to the State of Ohio through its various agencies, boards, commissions, universities and political subdivisions. In addition to tax debts that are not subject to the dispute between the parties in this matter, some of those debts include medical bills, student tuition and other non-tax debts.

3. As part of the effort to fulfill those collections duties, at all times relevant hereto, the Attorney General has annually appointed attorneys to act as special counsel for collections (the "Special Counsel",) pursuant to the authority of R.C. 109.08, which specifically provides that "[t]he attorney general may appoint special counsel to represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect."

4. The Attorney General regularly appoints individual attorneys to act as Special Counsel for collection of claims.

5. Special Counsel are members of the unclassified civil service of the State of Ohio pursuant to R.C.

124.11(A)(11), which provides that: "The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required by this chapter: ... Assistants to the attorney general, special counsel appointed or employed by the attorney general, assistants to county prosecuting attorneys, and assistants to city directors of law...."

6. Special Counsel attempt to collect and do collect debts certified to the Ohio Attorney General. Such debts are claims of varying nature that are owed to various agencies and entities of the State of Ohio.

7. In order to assure debtors that Special Counsel are duly authorized representatives of the Attorney General's office collecting debts of the State of Ohio, the Attorney General has authorized the attorneys appointed as Special Counsel for collections to use the official letterhead stationery of the Attorney General in their collections communications, including collections efforts for non-tax debts. Some Special Counsel refer to themselves as "special counsel" in communications with consumer debtors and some Special Counsel refer to themselves as "outside counsel."

8. The Attorney General requires Special Counsel by contract, verbally or in writing, to use official letterhead stationery of the Ohio Attorney General for all collection activities regardless of whether they arise out of taxes.

9. The term "official letterhead stationery of the Attorney General" means for the purposes of this declaratory judgment action, Special Counsel's use of the letterhead of the Ohio Attorney General,

including the name of the Ohio Attorney General, the seal of the State of Ohio, and/or the seal of the Ohio Attorney General.

10. The use of the Attorney General letterhead by Special Counsel is lawful and does not constitute deceptive, untruthful, unfair or unconscionable conduct in relation to collections activities under any of the applicable state or federal laws.

11. Special Counsel appointed for collections enter into written contracts with the Attorney General. Each fiscal year standardized contracts are executed between the Special Counsel and the Attorney General.

12. Special Counsel are not employees of the State. Special Counsel do not receive health care benefits from the State of Ohio, and Special Counsel do not participate in the Public Employees Retirement System by reason of being "special counsel." Special Counsel are not paid a salary by the Attorney General but rather Special Counsel are paid for their services from funds Special Counsel collect as set forth in the written contracts. Special Counsel are provided with 1099 forms from the Attorney General or State of Ohio for tax purposes. The Attorney General may terminate the relationship with Special Counsel in the Attorney General's sole discretion and without cause or duty of explanation.

13. Special Counsel are free to perform legal work for other clients besides the Ohio Attorney General and/or the State of Ohio so long as there is not a conflict of interest under Ohio Rules of Professional Conduct or as determined pursuant to the discretion of the Attorney General. Special Counsel do not use office space provided by the Attorney General and/or

the State of Ohio, nor are they provided with state vehicles, expense accounts or credit cards by the State of Ohio or the Attorney General. Special Counsel may use other people within Special Counsel's organization, namely their own law firm, to assist in collection of the claims assigned by the State of Ohio to Special Counsel. Special Counsel are not bonded by the Attorney General or the State of Ohio.

14. Debts owed to State agencies and political subdivisions are certified to the Attorney General for collection. Each debt is loaded into the Attorney General's electronic database known as the Columbia Ultimate Business System ("CUBS",). CUBS uses electronic "fields" for debtor name, identifying information, contact information, and client information, and automatically updates balances by adding interest and cost amounts, which may vary depending on the type of debt. Documents from the client agencies or political subdivisions that correspond with each debt are housed on a separate database known as "Content Manager," and are linked to the relevant CUBS accounts so that CUBS users can view documents associated with each debt. As additional documents are acquired during the collections process, they are uploaded into Content Manager and linked to the CUBS debt accounts.

15. Each debt is assigned an account code that will trigger pre-set actions to be applied to the account by the CUBS programming. A complex "forward master" program has been developed for each debt type, and the forward master programming will cause CUBS to generate a pre-selected number of collection letters to

debtors, and to "forward" the debts through a preselected collection process.

16. Most debts are initially forwarded by CUBS to in-house collection staff at the Attorney General's office, and are slated for delivery of a series of collection letters on Attorney General letterhead that are sent to the debtors. As debtors respond to the letters or calls by in-house collectors, payments and correspondence are added to the CUBS and/or Content Manager databases. CUBS maintains a running account balance and each adjustment to the account balance is documented, whether made electronically by CUBS, e.g., for interest or payment updates, or manually by staff, e.g., for adjustments based on updated information provided by the client and/or debtor or for settlements.

17. At each stage in the forward master process, when debts are forwarded they are not actually transferred out of the CUBS and Content Manager databases. Instead, the collectors are merely notified of the existence of the account and the assigned collector, whether it is an in-house employee, a Special Counsel or another external collector, is given access to the account on CUBS. Some of the Special Counsel operate a CUBS program on their own computer servers that "ghosts" the CUBS database for accounts assigned to them. However, those programs are tied to the CUBS program and all information entered on the independent databases is uploaded nightly to CUBS so that the CUBS account is accurate and complete at all times.

18. Most Special Counsel operate directly in the CUBS database through an internet interface known as "ClientView." ClientView is accessible to all State

client agencies and political subdivisions so they can monitor the progress of the debts and actually view the comments and documents linked to the CUBS account. When Special Counsel open Client View, they see the CUBS and Content Manager data in "real time" and information entered by the Special Counsel through ClientView is instantaneously entered into CUBS. Special Counsel are required by the Attorney General to keep CUBS updated with information regarding all contacts with debtors and all legal actions taken. Documents from Special Counsel are scanned and uploaded into the Content Manager database and linked to the debtor accounts on CUBS.

19. Special Counsel are contractually required by the Attorney General to comply with the standards of behavior set forth in the Fair Debt Collection Practices Act, and state in their letters to debtors that they are "debt collectors." This contractual requirement does not constitute an admission that the Act applies to the activities of the Special Counsel of Attorney General in regard to debt collection, but is intended to establish standards of conduct consistent with the standards applicable to debt collection practices in general.

20. Special Counsel draft, print, compile, and distribute each collection letter they use on the official letterhead stationery of the Attorney General. The Attorney General's Office does not individually review and authorize each collection letter sent by Special Counsel on the official letterhead stationery of the Attorney General, although specific language is mandated for routine collection letters and staff members of the Attorney General review Special

Counsel's standard letter templates during site visits.

21. Each Special Counsel has a true business name, company name or organization name which is different than the Attorney General's Office (for example, "John Doe, Attorney at Law" or "The Law Office of Jane Doe"). Each Special Counsel uses his or her true business name, company name or organization name in the collection letters they send using the official letterhead stationery of the Attorney General, and on the envelopes they use to send such collection letters.

22. Special Counsel are directed by the Attorney General to send letters to debtors on the Attorney General's official letterhead stationery. They are required to include their status as "Special Counsel" or "Outside Counsel" on the letters. Special Counsel have checks sent to their own places of business so that they can label the checks with the appropriate CUBS account numbers before they are deposited into the State's checking account. Therefore, all letters include the Special Counsel's address. Special Counsel use both the official letterhead stationery of the Attorney General's Office as well as their own names and their own law office names in their letters to debtors. Special Counsel use their own addresses on envelopes sent to debtors, and the Attorney General logo is not displayed on the envelopes. Special Counsel place their own name, and/or their own organization name rather than making reference to their designation as "special counsel" on the return address sections of the envelopes containing the collection letters to consumer debtors

bearing the letterhead of the Attorney General's Office.

23. Special Counsel work closely with Attorney General staff. Special Counsel are trained every year by Attorney General staff in customer service and debt collection techniques so that debtors are treated in conformity with Attorney General standards. If Special Counsel receive a customer service complaint, they will note the CUBS account and advise the Attorney General staff. Special Counsel are required to obtain Attorney General approval to file suit against a debtor, and to take other legal actions other than garnishments or judgment debtor examinations.

24. Each Special Counsel is assigned one or more account representatives at the Attorney General's office. Usually there is an account representative for tax debt and a different representative for non-tax debt, and there are specialized account representatives for certain debt types or matters, such as bankruptcy or foreclosure proceedings. If Special Counsel need to obtain information from the client agencies or political subdivisions, they request that information through the applicable Attorney General account representative. For example, if a debtor submits documentation that may alter a debt balance, the Special Counsel will forward that to the account representative, who will forward it to the client agency. The agency may choose to adjust the account balance, which will be reflected on CUBS. The Special Counsel and the account representative will enter notes on CUBS that discuss the handling of the documentation, and the documents will be uploaded to Content Manager and linked to the

CUBS account. The Special Counsel also have access to Assistant Attorneys General ("AAGs") who have specialized knowledge about each debt type. The Special Counsel may ask questions or obtain legal guidance from the AAGs, and there is an internal web site and chat forum where briefs, legal memoranda and discussions are shared.

25. Not all Special Counsel who collect debt for the Attorney General perform the same functions. The largest group of Special Counsel practice as General State Collections Counsel, and they are assigned a wide variety of debt types. Smaller groups of Special Counsel specialize in Bankruptcy Collection Matters, Medicaid Estate Recovery, Subrogation Collections, University Collections, University Medical Center Collections and Local Debt Collections. During Fiscal Year 2012, the Attorney General retained 86 Special Counsel. During Fiscal Year 2013, the Attorney General has retained 69 Special Counsel.

26. The operations of the Collections Enforcement Section of the Attorney General are of vital importance to the fiscal health of the State. In Fiscal Year 2012, the Attorney General collected over $466 million in debt owed to the State. Of that amount, over $191 million was collected by Special Counsel. As of December 31, 2012, the Attorney General had assigned 791,150 non-tax debt accounts with balances totaling $13,189,745,245.37 to Special Counsel for Fiscal Year 2012. Special Counsel are paid on a contingent basis in accordance with their respective retention agreements based on the amounts collected by them.

27. Debts owed to the State and certified to the Attorney General are accorded special statutory

advantages to aid in collections. The most significant is that such debts are eligible to be collected through state and federal tax refund offsets. Similarly, such debts may be collected through lottery and racino winning offsets. The Ohio Department of Taxation and the Ohio Lottery Commission check the CUBS database before refunds or winnings are paid to ensure offsets. In addition, owing debts to the State can sometimes adversely affect employment, e.g., debtors who owe findings for recovery pursuant to the audit of a public entity are precluded from entering into a contract with the State, educators who owe findings for recovery to educational entities may have their teaching or other educational licenses suspended, and insurance agents who owe debts that are subject to liens of the State may have their insurance licenses suspended.

28. Within the guidelines as presented by Attorney General staff to Special Counsel during training, Special Counsel generally exercise discretion regarding activities such as generating letters, compiling and mailing letters, phone correspondence, follow up communication, receiving payments, and forwarding payments.

29. Debtors frequently call Attorney General staff after receiving collection letters from Special Counsel. The debtors are generally assured that the debt is valid and being collected at the direction of the Attorney General and are directed to work with the Special Counsel to resolve the debt. If a debtor has concerns regarding the handling of their account by Special Counsel, the account representative assigned to that Special Counsel will seek to resolve the issues by communicating with both the Special

Counsel and the debtor. When complicated or sensitive legal matters are involved, AAGs and/or upper management of the Attorney General's office will work with Special Counsel and the debtors to resolve the issues.

30. AAGs frequently assist Special Counsel in drafting pleadings, and sometimes join cases as co-counsel to assist Special Counsel with particularly sensitive or complex cases. AAGs will "cover" cases for Special Counsel in special circumstances, e.g., attending hearings when a Special Counsel is ill or away, and in turn, Special Counsel have "covered" cases for AAGs, e.g., attending hearings for simple matters in remote areas of the State, even though the accounts are not assigned to the AAGs or Special Counsel that are providing the coverage.

31. In the event that there is a complaint about a Special Counsel, or if there is a concern that a Special Counsel may have violated a policy or guideline of the Attorney General, the Attorney General has a variety of options to address such issues, including counseling the Special Counsel conducting a site visit to review Special Counsel operations and/or to address Special Counsel staff who work on Attorney General accounts, requiring additional continuing legal education by the Special Counsel, directing that Special Counsel alter legal pleadings or correspondence, requiring additional approvals before taking specified actions such as offering payment plans, removing accounts from Special Counsel or limiting further assignments of accounts to Special Counsel and terminating the Special Counsel.

32. Plaintiffs have received collections letters from Special Counsel in relation to non-tax debts, including medical and student tuition debts, which letters were written using the official letterhead stationery of the Attorney General.

33. Plaintiffs assert that the Attorney General's authorization of the use of Attorney General letterhead by Special Counsel constitutes violations of various laws and have sued two individuals that have been appointed as Special Counsel by the Attorney General, and intend to sue others for those same claims.

34. The lawsuit by the plaintiffs against Special Counsel will interfere with the Attorney General's lawful collections activities; intimidate or coerce attorneys to refrain from pursuing appointments as special counsel for collections; inhibit and impede current Special Counsel's efforts to collect debts lawfully under such appointments; and interfere with the Attorney General's relationships with Special Counsel.

35. The Attorney General has a substantial interest in defending the practice of instructing Special Counsel to use Attorney General letterhead in collections communications as well as the statutes, orders and agreements underlying the practice.

36. The Eleventh Amendment to the United States Constitution shields the Ohio Attorney General and the State of Ohio from liability for damages claims under the Fair Debt Collection Practices Act, 15 U.S.C. 1692, *et seq.*

37. Principles of sovereign immunity shield the Ohio Attorney General and the State of Ohio from

liability for damages claims under the Fair Debt Collection Practices Act, 15 U.S.C. 1692, *et seq*.

38. The Attorney General is entitled to a declaration pursuant to 28 U.S.C. § 2201 that Special Counsel's use of Attorney General letterhead is letterhead not a violation of the Fair Debt Collection Practices Act.

39. The Attorney General is entitled to a declaration pursuant to 28 U.S.C. § 2201 that principles of sovereign immunity and the Eleventh Amendment to the United States Constitution confer immunity on the Ohio Attorney General and the State of Ohio from any liability under the Fair Debt Collection Practices Act, 15 U.S.C. 1692, *et seq*.

WHEREFORE, Plaintiff Ohio Attorney General asks this Court to grant plaintiff Ohio Attorney General relief as follows:

1. A declaration, pursuant to 28 U.S.C. § 2201 that the use of Attorney General letterhead by Special Counsel does not violate any provision of the federal Fair Debt Collection Practices Act, 15 U.S.C. 1692, *et seq*;

2. A declaration that principles of sovereign immunity and the Eleventh Amendment to the United States Constitution confer immunity on the Ohio Attorney General and the State of Ohio from any liability under the Fair Debt Collection Practices Act, 15 U.S.C. 1692, *et seq*.; and

3. Such other relief as may be appropriate.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Ohio Attorney General

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COUNSEL FOR
INTERVENING DEFENDANT
AND COUNTERCLAIMANT
OHIO ATTORNEY GENERAL

CERTIFICATE OF SERVICE

On April 5, 2013 this document was served via this Court's electronic filing system on the following counsel of record:

Eric E. Willison, Esq.
4876 Cemetery Road
Hilliard, Ohio 43026

eewillison@earthlink.net

Counsel for plaintiffs

On April 5, 2013 a copy of this document was served via regular mail on the following:

Law Office of Eric A. Jones, LLC
c/o statutory agent for service of process
Eric A. Jones
2668 Welsford Road
Upper Arlington, Ohio 43221

Eric A. Jones
2668 Welsford Road
Upper Arlington, Ohio 43221

Wiles, Boyle, Burkholder & Bringardner Co., L.P.A.
c/o statutory agent for service of process
Kerry T. Boyle
300 Spruce Street Ste. 100
Columbus, Ohio 43215

Mark Sheriff
2330 Sandover Road
Upper Arlington, Ohio 43220

Sarah Sheriff
300 Spruce Street Ste. 100
Columbus, Ohio 43215

Defendants

/s/ Christopher P. Conomy
CHRISTOPHER P CONOMY
(0072094)

Doc. 25

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 2:13-cv-00212
Judge James L. Graham
Filed: August 22, 2013

PAMELA GILLIE, *et al.*,

Plaintiffs,

vs.

LAW OFFICE OF ERIC A. JONES, LLC, *et al.*,

Defendants.

ANSWER OF DEFENDANTS WILES, BOYLE, BURKHOLDER & BRINGARDNER CO., LPA, MARK SHERIFF AND SARAH SHERIFF TO PLAINTIFF'S COMPLAINT

JURY DEMAND ENDORSED HEREON

For their separate answers to the Complaint, defendants, Mark Sheriff, Sarah Sheriff and Wiles, Boyle, Burkholder & Bringardner:

First Defense

1. Admit the allegation in paragraph 1 of the Complaint.

2. Admit that Ohio Revised Code §109.88 allows the Attorney General to engage special counsel and that such counsel are required to sign a retention agreement and that special counsel are required to

use Attorney General letterhead and state that they are without knowledge or information sufficient to form a belief as to all the remaining allegations in paragraphs 2 through 10 and therefore deny the same.

3. Deny the allegations in paragraphs 11 and 12 of the Complaint.

4. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 12 through 26 and therefore deny these allegations.

5. Admit that there is a retention agreement and they are without knowledge or information sufficient to form a belief as to the truth of all the allegations in paragraphs 27 through 40 and therefore deny same.

6. State that they are without knowledge sufficient to form a belief as to the truth of the allegations in paragraphs 40 through 60 and therefore deny same.

7. Deny the allegations in paragraphs 61 through 86 and note that the Meadows letter is not attached.

8. State that they are without knowledge sufficient to form a belief as to the truth of the allegations in paragraphs 87 through 89 and therefore deny same.

9. Deny all the allegations in paragraphs 90 through 124.

10. Deny all the allegations in paragraphs 125 through 136.

11. Deny any allegation not specifically admitted to be true.

Second Defense

12. State that plaintiffs' claims in Federal Court are barred by the Eleventh Amendment.

Third Defense

13. State that plaintiffs' claims against these defendants are barred by absolute and/or qualified immunity.

Fourth Defense

14. State that the Complaint fails to state a claim upon which relief can be granted.

Fifth Defense

15. State that plaintiff Pamela Gillie lacks standing as her claims were part of the bankruptcy in Case No. 2:12-BK-5033.

Sixth Defense

16. State that the plaintiffs' claims against these defendants are barred by sovereign immunity and the Fair Debt Collection Practices Act.

Seventh Defense

17. State that since these defendants were required by law to use Ohio Attorney General letterhead and the plaintiffs' claims are thereby barred.

Eighth Defense

18. State that any actions taken by Sarah Sheriff and Mark Sheriff were taken in their capacity as employees of Wiles, Boyle, Burkholder & Bringardner and they are not personally liable under the Fair Debt Collection Practices Act.

WHEREFORE, having fully answered the Complaint herein, the defendants demand that said Complaint be dismissed and they recover their costs herein expended including a reasonable attorneys' fee.

/s/Dale D. Cook
Michael L. Close (0008586)
Dale D. Cook (0020707)
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Attorneys for Defendants Mark Sheriff, Sarah Sheriff and Wiles, Boyle, Burkholder & Bringardner

JURY DEMAND

Defendants hereby demand trial by jury of all issues contained herein.

/s/Dale D. Cook
Dale D. Cook

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/Dale D. Cook
Dale D. Cook

Doc. 31

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 2:13-cv-00212
Judge: GRAHAM
Magistrate Judge: PRESTON DEAVERS
Filed: September 10, 2013

PAMELA GILLIE, et al.,

Plaintiffs,

v.

LAW OFFICE OF ERIC A. JONES, LLC, et al.,

Defendants.

PLAINTIFFS' ANSWER TO COUNTERCLAIM OF INTERVENOR OHIO ATTORNEY GENERAL MICHAEL DEWINE

Now come the Plaintiffs in the above captioned matter and set forth below their ANSWER pursuant to *Fed. R. Civ. P. 12(a)(1)(B)* to the Counterclaim filed by intervenor, Ohio Attorney General, Michael DeWine ("OAG").

FIRST DEFENSE

1. Plaintiffs admit the statements made in ¶¶s 1, 2, 4, 8, 9, 11, 12, 13, 21, and 32 of the OAG's Counterclaim.

2. Plaintiffs deny the statements made in ¶¶s 10, 34, and 35 of the OAG's Counterclaim.

3. Plaintiffs deny for want of additional information, knowledge, legal conclusion and/or legal interpretation, the statements made in ¶¶s 5, 14, 15, 16, 17, 18, 20, 23, 24, 25, 27, 28, 29, 30, 31, 36, 37, 38 and 39 of the OAG's Counterclaim.

4. In reference to ¶ 3 of the OAG's Counterclaim, Plaintiffs admit that the OAG has annually appointed attorneys to act as special counsel, but deny for want of legal conclusion and/or interpretation all remaining statements made therein.

5. In reference to ¶ 6 of the OAG's Counterclaim, Plaintiffs admit that special counsel attempt to collect and do collect debts/claims of a varying nature that are owed to various agencies and entities of the State of Ohio, but deny for want of legal conclusion, interpretation, and/or the significance of, the undefined phrase "certified to the Ohio Attorney General" as such phrased is used therein.

6. In reference to ¶ 7 of the OAG's Counterclaim, Plaintiffs admit that some special counsel refer to themselves as "Special Counsel" while others refer to themselves as "Outside Counsel", but deny all remaining statements made therein.

7. In reference to ¶ 19 of the OAG's Counterclaim, Plaintiffs admit that "special counsel are contractually required by the Attorney General to comply with the standards and behavior set forth in the Fair Debt Collection Practices Act, and state in their letters to debtors that they are debt collectors", but deny for want of legal conclusion and/or interpretation all other statements made therein.

8. In reference to ¶ 22 of the OAG's Counterclaim, Plaintiffs admit that "special counsel are directed by the Attorney General to send letters to debtors on the Attorney General's official letterhead stationary, but deny for want of further information, knowledge, legal conclusion or interpretation, all remaining statements made therein.

9. In reference to ¶ 26 of the OAG's Counterclaim, Plaintiffs admit that special counsel are paid on a "contingent basis in accordance with their respective retention agreements based upon the amounts collected by them", but deny for want of further information and knowledge all remaining statements made therein.

10. In reference to ¶ 33 of the OAG's Counterclaim, Plaintiffs state as follows:

a. Plaintiffs categorically deny that they are challenging [or have ever challenged] whether the "Attorney General's *authorization* of the use of Attorney General letterhead" violates any laws;

b. Plaintiffs admit that they specifically assert that special counsel's actual use of the Office of the Attorney General's official letterhead stationary in the collection of actual consumer debts violates the Fair Debt Collection Practices Act [15 U.S.C. §1692 et seq.] ("FDCPA") in the numerous ways described in the Complaint;

c. Plaintiffs admit that they have in fact sued "two individuals" that have been hired by the OAG as special counsel, but state further that in addition to such individuals, Plaintiffs

have sued other law firms and employees of such law firms for violating the FDCPA in the numerous ways described in the Complaint;

d. Plaintiffs deny that they have asserted violations of "various laws" Plaintiffs state that their Complaint is predicated solely upon their case under the FDCPA.

e. Plaintiffs deny that they "intend to sue others for those same claims", but state that all such "others' are already juridically linked to the facts and circumstances outlined in Plaintiffs' Complaint and further, that upon proper certification such "others" may become part of a class or classes of defendants in this action.

11. Plaintiffs deny each and every other statement made in the OAG's Counterclaim not heretofore expressly admitted.

SECOND DEFENSE

12. The OAG's Counterclaim fails to state a claim upon which relief can be granted.

THIRD DEFENSE

13. Neither the OAG nor the State of Ohio has proper standing in this litigation to seek declaratory relief.

FOURTH DEFENSE

14. The Court lacks subject matter jurisdiction to consider the OAG's Counterclaim.

FIFTH DEFENSE

15. Plaintiffs' Complaint sets forth an actual case and controversy before the Court, and as such, the OAG's request for declaratory relief should be deemed imprudent and unnecessary.

SIXTH DEFENSE

16. Plaintiffs have not sought to resolve claims against the OAG or the State of Ohio. Plaintiffs have not asserted that either the OAG or the State of Ohio has violated the FDCPA. Plaintiffs have not alleged in any respect that either the OAG or the State of Ohio have committed violations of the FDCPA or are liable to Plaintiffs for damages under the FDCPA. Thus, the OAG's specific requests for declaratory relief are not ripe for determination.

SEVENTH DEFENSE

17. The OAG has no statutory authority or basis under 28 U.S.C. §2201 which to file or prosecute his declaratory relief requests.

EIGHTH DEFENSE

18. Plaintiffs reserve the right to supplement this ANSWER when discovery has been completed.

Respectfully submitted

NOBILE & THOMPSON CO., L.P.A.

/s/James E. Nobile
James E. Nobile (0059705)
Eric E. Willison (0066795)
Michael B. Zieg (0066386)
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and authentic copy of the foregoing PLAINTIFFS' ANSWER TO COUNTERCLAIM OF INTERVENOR OHIO ATTORNEY GENERAL MICHAEL DEWINE was served this 10th day of SEPTEMBER 2013 via the Court's ECF/CM system by email at the address each recipient has registered with the Clerk:

Christopher P Conomy -
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NOBILE & THOMPSON CO., L.P.A.

/s/James E. Nobile
James E. Nobile (0059705)

Doc. 36-1

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Case No. 2:12-cv-01053
Judge Gregory L. Frost
Magistrate Judge Terrence P. Kemp
Filed: 10/07/2013

State of Ohio,

Plaintiff,

v.

Nobile & Thompson Co., L.P.A.,

Defendant.

JOINT STIPULATIONS OF FACT

Now come Plaintiff State of Ohio and Defendant Nobile & Thompson Co., L.P.A., and stipulate to the following factual findings:

1. The Ohio Attorney General is the chief law officer for the State of Ohio. The Attorney General's duties include pursuing the collection of debts owed to the State of Ohio through its various agencies, boards, commissions, universities and other political subdivisions. In addition to tax debts that are not subject to the dispute between the parties in this matter, some of those debts include medical bills, student tuition and other non-tax debts.

2. For the purpose of the January 30 hearing, **and for no other purpose,** the parties stipulate that

some debts collected by the Attorney General for the State may be assumed to be "consumer debts" under the relevant laws.

3. As used in these stipulations a "claim", "account" or "record" is a debt due to the State of Ohio.

4. The Attorney General regularly appoints individual attorneys to act as Special Counsel for collection of claims.

5. Special Counsel attempt to collect and do collect debts certified to the Ohio Attorney General. Such debts are claims of varying nature that are owed to various agencies and entities of the State of Ohio.

6. The Attorney General has authorized the attorneys appointed as Special Counsel for collections to use the official letterhead stationery of the Attorney General in their collections communications, including collections efforts for non-tax debts.

7. The Attorney General requires Special Counsel by contract, verbally or in writing, to use official letterhead stationery of the Ohio Attorney General for all collection activities regardless of whether they arise out of taxes.

8. The term "official letterhead stationery of the Attorney General" means for the purposes of these stipulations, Special Counsel's use of the letterhead of the Ohio Attorney General, including the name of the Ohio Attorney General, the seal of the State of Ohio, and/or the seal of the Ohio Attorney General.

9. Defendant Nobile & Thompson Co., L.P.A. is a professional association engaged in business as a law firm located in Hilliard, Ohio. A primary focus of the

practice of Nobile & Thompson is the representation of debtors and bankruptcy petitioners. Nobile & Thompson represents several individuals in relation to non-tax debts owed to the State of Ohio.

10. Several clients of Nobile & Thompson have received collections letters from Special Counsel in relation to non-tax debts, including medical and student tuition debts, which letters were written using the official letterhead stationery of the Attorney General. The letters are substantially similar in form and content to the exemplar letters attached as composite Exhibit A to these stipulations with personal identifiers redacted. Nobile & Thompson has asserted that the use of the Attorney General's official letterhead stationery by Special Counsel is a violation of various state and federal laws relating to collections activities and has demanded that the practice cease.

11. Defendant Nobile & Thompson sent a letter to the Attorney General (the "AG Letter"). A true and accurate copy of such letter is attached as Exhibit B.

12. Defendant Nobile & Thompson mailed identical letters to 82 current and former Special Counsel (the "Letters"). A true and accurate copy of one such letter, with personal identifiers redacted, is attached as Exhibit C.

13. Special Counsel appointed for collections enter into written contracts with the Attorney General. Each fiscal year standardized contracts are executed between the Special Counsel and the Attorney General. The contracts are substantially similar in form and content to the exemplar contracts attached to these stipulations as Exhibit D (for Fiscal Year 2012) and Exhibit E (for Fiscal Year 2013).

14. Special Counsel are not employees of the State.

15. The Attorney General may terminate the relationship with Special Counsel in the Attorney General's sole discretion and without cause or duty of explanation.

16. Special Counsel do not receive health care benefits from the State of Ohio.

17. Special Counsel do not participate in the Public Employees Retirement System by reason of being "special counsel."

18. Special Counsel are not paid a salary by the Attorney General but rather Special Counsel are paid for their services from funds Special Counsel collect as set forth in the written contracts.

19. Special Counsel are free to perform legal work for other clients besides the Ohio Attorney General and/or the State of Ohio so long as there is not a conflict of interest under Ohio Rules of Professional Conduct or as determined pursuant to the discretion of the Attorney General.

20. Special Counsel do not use office space provided by the Attorney General and/or the State of Ohio.

21. Special Counsel are not issued W-2**[ILLEGIBLE]** by the Attorney General or the State of Ohio for tax purposes.

22. Special Counsel are provided with 1099**[ILLEGIBLE]** from the Attorney General or State of Ohio for tax purposes.

23. Special Counsel are not provided with state vehicles by the State of Ohio or the Attorney General.

24. Special Counsel are not provided with expense accounts from the State of Ohio or the Attorney General.

25. Special Counsel are not provided with credit cards from the State of Ohio or the Attorney General.

26. Special Counsel may use other people within Special Counsel's organization, namely their own law firm, to assist in collection of the claims assigned by the State of Ohio to Special Counsel.

27. Some Special Counsel refer to themselves as "special counsel" in communications with consumer debtors and some Special Counsel refer to themselves as "outside counsel."

28. Special Counsel are not bonded by the Attorney General or the State of Ohio.

29. The Attorney General's Office does not individually review and authorize each collection letter sent by Special Counsel on the official letterhead stationery of the Attorney General, although specific language is mandated for routine collection letters and staff members of the Attorney General review Special Counsel's standard letter templates during site visits.

30. Special Counsel draft, print, compile, and distribute each collection letter they use on the official letterhead stationery of the Attorney General.

31. Each Special Counsel has a true business name, company name or organization name which is different than the Attorney General's Office (for example, "John Doe, Attorney at Law" or "The Law Office of Jane Doe").

32. Each Special Counsel uses his or her true business name, company name or organization name in the course of practicing law as to matters not related to his or her designation as "special counsel" by the Attorney General.

33. Each Special Counsel uses his or her true business name, company name or organization name m the collection letters they send using the official letterhead stationery of the Attorney General.

34. Each Special Counsel uses his or her true business name, company name or organization name on the envelopes they use to send collection letters with the official letterhead stationery of the Attorney General.

35. "Special Counsel" are contractually required by the Attorney General to comply with the standards of behavior set forth in the Fair Debt Collection Practices Act.

36. Special Counsel state in their letters to debtors that they are "debt collectors."

37 Debts owed to State agencies and political subdivisions are certified to the Attorney General for collection Each debt is loaded into the Attorney General's electronic database known as the Columbia Ultimate Business System ("CUBS"). CUBS uses electronic "fields" for debtor name, identifying information, contact information, and client information, and automatically updates balances by adding interest and cost amounts, which may vary depending on the type of debt. Documents from the client agencies or political subdivisions that correspond with each debt are housed on a separate database known as "Content Manager," and are

linked to the relevant CUBS accounts so that CUBS users can view documents associated with each debt. As additional documents are acquired during the collections process, they are uploaded into Content Manager and linked to the CUBS debt accounts.

38. Each debt is assigned an account code that will trigger pre-set actions to be applied to the account by the CUBS programming. A complex "forward master" program has been developed for each debt type, and the forward master programming will cause CUBS to generate a pre-selected number of collection letters to debtors, and to "forward" the debts through a pre-selected collection process.

39. Most debts are initially forwarded by CUBS to in-house collection staff at the Attorney General's office, and are slated for delivery of a series of collection letters on Attorney General letterhead that are sent to the debtors. As debtors respond to the letters or calls by in-house collectors, payments and correspondence are added to the CUBS and/or Content Manager databases. CUBS maintains a running account balance and each adjustment to the account balance is documented, whether made electronically by CUBS, e.g., for interest or payment updates, or manually by staff, e.g., for adjustments based on updated information provided by the client and/ or debtor or for settlements.

40. Unless the debts are paid or have recent payments applied to the account, most debts are then forwarded by CUBS to Third Party Vendors ("TPVs") for further collection efforts. Unless the debts are paid or have recent payments applied to the account, most debts are then forwarded by CUBS to Special Counsel for further collection efforts. Unless debts

are paid or have recent payments applied to the account, most debts are forwarded by CUBS to distressed debt vendors ("DDVs").

41. The Attorney General routinely sweeps inactive accounts from Special Counsel and reassigns them to the CUBS forward master program, which will automatically assign the accounts to a different Special Counsel. At the end of the DDV stage, unless the debts are paid or have recent payments applied to the accounts, they are then forwarded by CUBS to the archive, where the debts lay dormant until written off. Statutorily, all debts must be written off after forty years, although many State clients write off debts after fifteen years. The Attorney General operates a program for archived debt where each debt is examined for further collection efforts, and debts in archive can be returned to the active database, e.g., if a previously uncollectable debtor obtains a lottery payout or any of the above collectors learns of a reason why a debt should be reactivated.

42. At each stage in the forward master process, when debts are forwarded they are not actually transferred out of the CUBS and Content Manager databases. Instead, the collectors are merely notified of the existence of the account and the assigned collector, whether it is an in-house employee, a Special Counsel, a TPV or a DDV, is given access to the account on CUBS. Some of the Special Counsel and most of the TPVs and DDVs operate a CUBS program on their own computer servers that "ghosts" the CUBS database for accounts assigned to them. However, those programs are tied to the CUBS program and all information entered on the independent databases is uploaded nightly to CUBS

so that the CUBS account is accurate and complete at all times.

43. Most Special Counsel operate directly in the CUBS database through an internet interface known as "ClientView." ClientView is accessible to all State client agencies and political subdivisions so they can monitor the progress of the debts and actually view the comments and documents linked to the CUBS account. When Special Counsel open ClientView, they see the CUBS and Content Manager data in "real time" and information entered by the Special Counsel through ClientView is instantaneously entered into CUBS. Special Counsel are required by the Attorney General to keep CUBS updated with information regarding all contacts with debtors and all legal actions taken. Documents from Special Counsel are scanned and uploaded into the Content Manager database and linked to the debtor accounts on CUBS.

44. Special Counsel are directed by the Attorney General to send letters to debtors on the Attorney General's official letterhead stationery. They are required to include their status as "Special Counsel" or "Outside Counsel" on the letters. Special Counsel have checks sent to their own places of business so that they can label the checks with the appropriate CUBS account numbers before they are deposited into the State's checking account. Therefore, all letters include the Special Counsel's address. Sample copies of letters sent by Special Counsel with individual identifiers redacted are attached as composite Exhibit A. Special Counsel use their own addresses on envelopes sent to debtors, and the

Attorney General logo is not displayed on the envelopes.

45. Special Counsel work closely with Attorney General staff. Special Counsel are trained every year by Attorney General staff in customer service and debt collection techniques so that debtors are treated in conformity with Attorney General standards. If Special Counsel receive a customer serv1ce complaint, they will note the CUBS account and advise the Attorney General staff. Special Counsel are required to obtain Attorney General approval to file suit against a debtor, and to take other legal actions other than garnishments or judgment debtor examinations.

46. Each Special Counsel is assigned one or more account representatives at the Attorney General's office. Usually there 1S an account representative for tax debt and a different representative for non-tax debt, and there are specialized account representatives for certain debt types or matters, such as bankruptcy or foreclosure proceedings. If Special Counsel need to obtain information from the client agencies or political subdivisions, they request that information through the applicable Attorney General account representative. For example, if a debtor submits documentation that may alter a debt balance, the Special Counsel will forward that to the account representative, who will forward it to the client agency. The agency may choose to adjust the account balance, which will be reflected on CUBS. The Special Counsel and the account representative will enter notes on CUBS that discuss the handling of the documentation, and the documents will be uploaded to Content Manager and linked to the

CUBS account. The Special Counsel also have access to Assistant Attorneys General ("AAGs") who have specialized knowledge about each debt type. The Special Counsel may ask questions or obtain legal guidance from the AAGs, and there is an internal web site and chat forum where briefs, legal memoranda and discussions are shared.

47 Not all Special Counsel who collect debt for the Attorney General perform the same functions. The largest group of Special Counsel practice as General State Collections Counsel, and they are assigned a wide variety of debt types. Smaller groups of Special Counsel specialize in Bankruptcy Collection Matters, Medicaid Estate Recovery, Subrogation Collections, University Collections, University Medical Center Collections and Local Debt Collections. During Fiscal Year 2012, the Attorney General retained 86 Special Counsel. During Fiscal Year 2013, the Attorney General has retained 69 Special Counsel.

48. The operations of the Collections Enforcement Section of the Attorney General are of vital importance to the fiscal health of the State. In Fiscal Year 2012, the Attorney General collected over $466 million in debt owed to the State. Of that amount, over $191 million was collected by Special Counsel, and over $85 million was collected by TPVs and DDVs. As of December 31, 2012, the Attorney General had assigned 791,150 non-tax debt accounts with balances totaling $13,189,745,245.37 to Special Counsel for Fiscal Year 2012. Special Counsel are paid on a contingent basis in accordance with their respective retention agreements based on the amounts collected by them.

49. Debts owed to the State and certified to the Attorney General are accorded special statutory advantages to aid in collections. The most significant is that such debts are eligible to be collected through state and federal tax refund offsets. Similarly, such debts may be collected through lottery and racino winning offsets. The Ohio Department of Taxation and the Ohio Lottery Commission check the CUBS database before refunds or winnings are paid to ensure offsets. In addition, owing debts to the State can sometimes adversely affect employment, e.g., debtors who owe findings for recovery pursuant to the audit of a public entity are precluded from entering into a contract with the State, educators who owe findings for recovery to educational entities may have their teaching or other educational licenses suspended, and insurance agents who owe debts that are subject to liens of the State may have their insurance licenses suspended.

50. Within the guidelines as presented by Attorney General staff to Special Counsel during training, Special Counsel generally exercise discretion regarding activities such as generating letters, compiling and mailing letters, phone correspondence, follow up communication, receiving payments, and forwarding payments.

51. Debtors frequently call Attorney General staff after receiving collection letters from Special Counsel. The debtors are generally assured that the debt is valid and being collected at the direction of the Attorney General and are directed to work with the Special Counsel to resolve the debt. If a debtor has concerns regarding the handling of their account by Special Counsel, the account representative

assigned to that Special Counsel will seek to resolve the issues by communicating with both the Special Counsel and the debtor. When complicated or sensitive legal matters are involved, AAGs and/or upper management of the Attorney General's office will work with Special Counsel and the debtors to resolve the issues.

52. AAGs frequently assist Special Counsel in drafting pleadings, and sometimes join cases as co-counsel to assist Special Counsel with particularly sensitive or complex cases. AAGs will "cover" cases for Special Counsel in special circumstances, e.g., attending hearings when a Special Counsel is ill or away, and in turn, Special Counsel have "covered" cases for AAGs, e.g., attending hearings for simple matters in remote areas of the State, even though the accounts are not assigned to the AAGs or Special Counsel that are providing the coverage.

53. In the event that there is a complaint about a Special Counsel, or if there is a concern that a Special Counsel may have violated a policy or guideline of the Attorney General, the Attorney General has a variety of options to address such issues, including counseling the Special Counsel, conducting a site visit to review Special Counsel operations and/or to address Special Counsel staff who work on Attorney General accounts, requiring additional continuing legal education by the Special Counsel, directing that Special Counsel alter legal pleadings or correspondence, requiring additional approvals before taking specified actions such as offering payment plans, removing accounts from Special Counselor limiting further assignments of

accounts to Special Counsel, and terminating the Special Counsel.

54. Special Counsel use both the official letterhead stationery of the Attorney General's Office as well as their own names and their own law office names in their letters to debtors.

55. Special Counsel place their own name, and/or their own organization name rather than making reference to their designation as "special counsel" on the return address sections of the envelopes containing the collection letters to consumer debtors bearing the letterhead of the Attorney General's Office.

APPROVED and AGREED by:

NOBILE & THOMPSON CO., L.P.A.

/s/Eric E. Willison
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COUNSEL FOR DEFENDANT
NOBILE & THOMPSON CO. L.P.A.

MICHAEL DEWINE (0009181)
Ohio Attorney General

/s/Christopher P. Conomy
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COUNSEL FOR PLAINTIFF STATE OF OHIO

Doc. 47-1 **EXHIBIT "1"**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 2:13-cv-00212
Judge James L. Graham
Filed: February 3, 2014

PAMELA GILLIE, *et al.*,

Plaintiffs,

vs.

LAW OFFICE OF ERIC A. JONES, LLC, *et al.*,

Defendants.

AFFIDAVIT OF MARK J. SHERIFF

STATE OF OHIO :
: ss.
COUNTY OF FRANKLIN :

Mark J. Sheriff, being duly cautioned and sworn, deposes and states:

1. He has personal knowledge of the facts recited in this Affidavit.

2. In 2012, he was a partner in the law firm of Wiles, Boyle, Burkholder & Bringardner, and he was appointed special counsel by the Ohio Attorney General.

3. A true and accurate copy of the retention agreement in effect on July 20, 2012 appointing him special collections counsel is attached as Exhibit A.

4. As part of his appointment as special counsel, he and any employees of Wiles, Boyle, Burkholder & Bringardner were required to use Ohio Attorney General letterhead on their communications with debtors.

5. As the use of state letterhead was required by the Ohio Attorney General, he did not believe or have any knowledge that such use was improper or that it could violate the Fair Debt Collection Practices Act.

6. Like the identification of the Law Office of Eric Jones in Exhibit C to the Complaint, any communication from Wiles, Boyle, Burkholder & Bringardner when acting as special counsel, identified Wiles, Boyle, Burkholder & Bringardner and directed payment to Wiles, Boyle, Burkholder & Bringardner at its address.

7. Further affiant sayeth naught.

/s/Mark J. Sheriff
Mark J. Sheriff

Sworn to before me and subscribed in my presence this 29 day of January, 2014.

/s/Lizabeth A. Russell
Notary Public

[notary seal]

Doc. 48-1 **EXHIBIT A**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 2:13-cv-212
Judge Graham
Magistrate Judge Deavers
Filed: February 3, 2014

Pamela Gillie, et al.,

Plaintiffs,

v.

Law Office of Eric A. Jones, LLC, et al.,

Defendants.

AFFIDAVIT OF PAMELA GILLIE

STATE OF OHIO)
) SS:
COUNTY OF FRANKLIN)

Pamela Gillie, first being duly sworn according to law, deposes and says as follows:

1. I have personal knowledge of the facts within this affidavit.

2. I am a Plaintiff in this case.

3. In May, 2012, I received a debt collection letter through the mail, a true and accurate copy of which is attached hereto as "Exhibit A1"

4. When I opened the letter, the first thing I saw was "Mike DeWine Ohio Attorney General" and the Seal, both located at the top of the letter.

5. I thought the letter was from the Ohio Attorney General.

6. I thought Eric A. Jones, who signed the letter, was someone from the Ohio Attorney General's Office.

7. The letter did not mention who was owed the debt, it just referenced a medical claim, but I believe the debt pertained to medical services provided during my pregnancy.

8. The letter said to contact Denise Hall at Eric A. Jones Law Office to make payment arrangements.

9. The letter also had a payment coupon at the bottom asking me to return that portion with my payment, and send my payment to Law Office of Eric A. Jones, L.L.C.

10. I was confused what the Law Office of Eric A. Jones had to do with the Ohio Attorney General.

11. I was confused why the Law Office of Eric A. Jones was sending a letter from the Ohio Attorney General.

12. I immediately thought the letter might be a scam because I was being asked to send money to an attorney and a law firm I did not know instead of to the Ohio Attorney General.

13. I was then confused as to who Eric Jones was, and did not know whether or not he was with the Ohio Attorney General's Office.

14. I was confused as to who Denise Hall was, and what she had to do with the Ohio Attorney General's Office.

15. I did not know what "Outside Counsel" meant.

16. The letter said it was a communication from a debt collector, and I assumed that if the letter was not a scam, the debt collector was the Ohio Attorney General, though I was not sure.

17. I was in bankruptcy at the time I received the letter, and I was concerned that if the letter was not a scam and I did not pay the money, the Attorney General might garnish my wages.

18. I thought the Attorney General might have some special power to override my bankruptcy and somehow stop or delay my bankruptcy case.

I then contacted my attorney Jim Nobile at Nobile & Thompson to show him the letter and see if he could answer my questions.

19. Further, Affiant Sayeth Naught.

/s/Pamela Gillie
Pamela Gillie

Sworn to before me and subscribed in my presence this 31st day of January, 2014.

/s/Michael B. Zeig
Notary Public, State of Ohio

[notary seal]

Doc. 48-3 **EXHIBIT B**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION

Case No. 2:13-CV-212
Judge: Graham
Magistrate:
Filed: February 3, 2014

Pamela Gillie, et al.,

Plaintiff,

v.

Law Office of Eric A. Jones, LLC, et al.,

Defendants.

AFFIDAVIT OF HAZEL MEADOWS

STATE OF OHIO)
) SS:
COUNTY OF FRANKLIN)

Hazel Meadows, first being duly sworn according to law, deposes and says as follows:

1. I have personal knowledge of the facts within this affidavit.

2. I am a Plaintiff in this case.

3. That I am over the age of 18.

4. I received a letter in the mail at my home, a true and accurate copy of which is attached hereto as Exhibit B1, on or around July 20, 2012.

5. When I got this letter in the mail, it was hard to tell who sent it to me.

6. At the top of the letter it showed it was from the Ohio Attorney General's Office.

7. But the envelope the letter came in said it was sent by the Law Office Wiles Boyle, Burkholder & Bringardner Co., L.P.A.

8. Though the letter said that it was in response to my request for information, I don't recall ever asking anyone for any information about this matter.

9. The letter was signed by someone named Sarah Sheriff who listed herself in the letter as "Special Counsel to the Attorney General for the State of Ohio."

10. The letter said that I owed money to the State of Ohio-University of Akron.

11. I believe this debt is for my unpaid tuition or fees to the University of Akron.

12. I attended and graduated from the University of Akron in the year 2001.

13. The letter said that it was from a debt collector.

14. Getting this letter in the mail scared me because I thought that the Ohio Attorney General might charge me with a crime for not paying what he said I owed.

15. I was confused about who was sending me this letter since both the Ohio Attorney General's Office was listed and a law firm.

16. I was very concerned and worried about this and went to see my attorney, Athena Inembolides to

see what I would have to do to avoid criminal charges or straighten this matter out without trouble.

17. Receiving this letter caused me both depression and stress.

18. I went to a mental health facility in Upper Arlington, Ohio to receive counselling for the stress and depression caused by this letter.

19. Further, Affiant Sayeth Naught.

/s/Hazel Meadows
Hazel Meadows

Sworn to before me and subscribed in my presence this 31st day of January, 2014.

/s/Eric Eastman Willison
Notary Public, State of Ohio

[notary seal]

Doc. 48-7 **EXHIBIT C2**

RETENTION AGREEMENT FOR COLLECTIONS SPECIAL COUNSEL

This Retention Agreement for Collections Special Counsel (hereinafter this "**Retention Agreement**") is entered into by and between the Ohio Attorney General (the "**Attorney General**") and [_____] (the "**Special Counsel**" as of this _____ day of _____, 2011.

RECITALS

WHEREAS, the Attorney General, pursuant to Ohio Revised Code ("**R.C.**") Section 109.08, is empowered to appoint special counsel to represent the State in civil actions, criminal prosecutions, or other proceedings in which the State is a party or directly interested; and

WHEREAS, the purpose of this Retention Agreement is to set forth the terms for the appointment and retention of special counsel who shall provide legal services to the State of Ohio, its offices, boards, departments, commissions, colleges, universities, retirement systems and political subdivisions (the "**State Clients**") relating to the collection of moneys due to the State.

NOW THEREFORE, in consideration for the mutual promises and covenants set forth herein and for other valuable consideration, the sufficiency of which is agreed to by the parties hereto, the Attorney General and Special Counsel (each individually, a "**Party**", and collectively the "**Parties**") hereby agree as follows:

Article I TERM

The appointment of Special Counsel and this Retention Agreement shall commence as of the date hereof and shall terminate on June 30, 2012, unless earlier terminated by the Attorney General, as set forth herein (the "**Termination Date**"). No services rendered by Special Counsel after the Termination Date shall be authorized or payable without an additional written agreement from the Attorney General.

Article II SERVICE

Section 1. Scope of Appointment

Special Counsel shall conduct any and all legal work assigned by the Attorney General.

Work hereunder shall be performed in a professional manner consistent with the accepted standards for practice in the legal profession including, but not limited to, the Ohio Supreme Court Rules for Government of the Bar and the Ohio Rules of Professional Conduct.

In view of the personal nature of the services to be rendered under this appointment, the Attorney General shall be the sole judge of the adequacy of those services.

Section 2. Assignment and Delegation of Work

Special Counsel may assign legal work to those individuals set forth in Special Counsel's response to the Attorney General's FY 11 Request for Qualifications (the "**RFQ Response**") and may only delegate work to other attorneys, legal professionals or firms with the advance written approval of the Attorney General.

In the event that Special Counsel delegates work to other firms, the compensation of such firms shall be a matter beyond the scope of this Retention Agreement to be negotiated in writing between Special Counsel and those firms prior to the commencement of any work by such firms, and shall be paid by Special Counsel. A copy of such compensation agreement shall be provided to the Attorney General's Director of Special Counsel in the Collections Enforcement Section (the "**Director**"). Neither any State Client nor the Attorney General shall be liable for any fees, compensation or expenses to be paid to other firms retained by Special Counsel. Special Counsel agrees to indemnify, defend, and hold harmless the Attorney General and the State of Ohio against any claim for reimbursement of fees, costs or expenses asserted by any firm retained by Special Counsel.

All firms to whom Special Counsel may delegate work under this Section must have qualifications and experience to perform the work requested and shall work under the supervision and control of Special Counsel. Although delegation may be permitted as provided herein, delegation shall not relieve Special Counsel of any responsibility or liability for the work performed hereunder. No provision of this Section shall be construed to allow Special Counsel to subcontract with, hire, or retain any law firm without the prior written consent of the Attorney General.

Section 3. Attorney-Client Relationship and Relationship of the Parties

Special Counsel is being appointed hereunder to provide legal services on behalf of the Attorney

General to one or more State Clients. Special Counsel will render services pursuant to this Retention Agreement as an independent contractor. Special Counsel, whether for purposes of applications of Ohio R.C. Chapter 102, Section 9.86 or Section 9.87, or for any other purpose, shall not be regarded as "in the employment of, or as an employee of, the Attorney General or any State Client.

In all pleadings, notices and/or correspondence created pursuant to the work being performed hereunder, Special Counsel shall indicate that such document is prepared by Special Counsel in its position as Special Counsel for the Attorney General Special Counsel shall not print business cards using the Attorney General's logo.

During the term of this appointment, Special Counsel shall be engaged by the Attorney General solely on an independent contractor basis, and Special Counsel shall therefore be responsible for all Special Counsel's business expenses, including, but not limited to, employees' wages and salaries, insurance of every type and description, and all business and personal taxes, including income and Social Security taxes and contributions for Workers' Compensation and Unemployment Compensation, if any.

Section 4. Claim Assignment

For the purposes of this Retention Agreement, a claim or an account or a record is a debt due the State of Ohio (each, a "**Claim**") Should Special Counsel receive assignment of a Claim from the Attorney General, Collections Enforcement Section, such assignment will be transferred electronically

and shall be subject to the provisions of this Retention Agreement.

Special Counsel who substantially increase the collection of their assigned Claims, while maintaining quality customer service, may be eligible to receive an increase in the number of Claims assignments made by the Attorney General. Special Counsel who are not successful may have a decrease in Claim assignments, and this Retention Agreement shall be subject to termination as provided herein.

Special Counsel agrees to abide by all policies and procedures promulgated by the Attorney General relating to collection of Claims.

Section 5. Specific Performance Measures

A personal performance review will be conducted on Counsel at the discretion of the Attorney General. Performance reviews may include, but are not limited to, the following areas: collection ratios, performance measures based on historical averages and comparisons of new and old accounts and various account types, customer service complaints, adequacy of equipment and staff support, reports, legal actions taken, status updates, and interviews. The Attorney General may communicate in writing any additional specific performance review requirements.

As a result of this review, the Attorney General may, in its sole discretion, increase or decrease Special Counsel's inventory of Claims, or terminate the Retention Agreement.

Special Counsel will be afforded an opportunity to confer with the Attorney General or his designee on any significant issues resulting from the Special

Counsel performance reviews. If requested, Special Counsel agrees to provide access to the Attorney General or his authorized agent to all documents, papers, records, and/or computer searches involving the services to be performed under the Retention Agreement, including all documents required by this Retention Agreement.

Section 6. Noteworthy Matters

Special Counsel agrees to consult, by telephone or email, with the Director of Special Counsel as soon as possible on all matters arising out of, or related to, Special Counsel's work hereunder that may be controversial, high profile, or otherwise noteworthy.

A matter is deemed noteworthy if it has the potential for drawing media attention, involves a significant change in the law or injunctive relief that would be extremely detrimental to the State, is particularly controversial, is an appeal or defense of an appeal, or involves a settlement in excess of $500,000. It is also considered noteworthy if Special Counsel is sued in any court of law where it is named as a defendant. Instances where Special Counsel is names as defendant or respondent before a court of law, an administrative agency, board or commission or any grievance commission or committee shall be considered noteworthy. These instances must be promptly reported to the Director of Special Counsel. Such reporting is a material condition of payment of special counsel fees under this agreement, and the continuance of this agreement.

Upon the filing of any pleading in a noteworthy matter, as defined herein, Special Counsel shall timely provide a time-stamped copy of such filing to the Director of Special Counsel.

Section 7. Media Statements

Neither Special Counsel nor any partner, associate, employee or any other person assisting with the work contemplated by this Retention Agreement shall publish any material, including online publications, or speak to or otherwise communicate with any representative of a television station, radio station, newspaper, magazine, website, or any other media outlet concerning the work outlined or contemplated by this Retention Agreement without first obtaining approval of the Attorney General's General Counsel and/or the Attorney General's Director of Communications. This Retention Agreement specifically excludes any right or ability on the part of Special Counsel to speak on behalf of the Attorney General to any member of the news media.

Section 8. Confidentiality/Public Records Act

Any material commissioned or gathered by Special Counsel or in Special Counsel's possession that fulfills an obligation of this Retention Agreement, including names and addresses of potential witnesses, shall be considered the property of the State of Ohio. Special Counsel agrees to adhere to Ohio's Public Records Act, R.C. Section 149.43, and maintain all public records in accordance with estate law. Special Counsel shall consult with and obtain the approval of the Chief of Collection Enforcement before responding to any public records request. Moreover, Special Counsel shall not disclose any information obtained in performing its services hereunder in violation of any state or federal law including, but not limited to, the Family Education Rights and Privacy Act ("FERPA") and/or the Health Insurance Portability and Accountability Act of 1996

("HIPAA") as the same may be amended or modified from time to time.

Special Counsel must maintain and file with the Director of Special Counsel a written policy and enforced practice for the safeguarding of a debtor's identity, including social security numbers, identification number, and other information that could be used to a debtor's disadvantage. This policy must include secure destruction of data under supervision, as well as the enforced prohibition of the unauthorized acquisition or retention of information by support staff and personnel, including social security numbers. Counsel acknowledges and understands that the Attorney General's Office and the State of Ohio will not enter into a provision designating a settlement agreement as "confidential" without express permission of the Attorney General.

Section 9. Correspondence

Except as otherwise set forth herein, all required notices and correspondence must be sent by certified or registered U.S. mail, return receipt requested, to the following addresses:

For the Attorney General:

Chief, Collections Enforcement
150 E. Gay Street, 21st Floor
Columbus, Ohio 43215
Telephone: (614) _____
Facsimile: (___) _____

For Special Counsel:

_____

_____

_____

Addresses may be changed at any time upon written notice to the other Party.

Article III Settlements

Section 1. Settlements

The Attorney General encourages negotiations or attempts to settle Claims assigned hereunder. Special Counsel understands and agrees that the initiation of litigation on behalf of the State and shall final settlements must receive the prior approval of the Attorney General. Special Counsel shall confer with the Attorney General's office, Chief of Collections Enforcement, on the waiver of interest and collection costs.

Special Counsel shall confer with the Chief of the Collections Enforcement Section or her designee early in the settlement negotiation process. Without limitation, Special Counsel agrees to confer with the Attorney General, Chief of Collections Enforcement, about the following matters when applicable:

1. Confidentiality provisions in settlement agreements
2. The Ohio Constitutions biennial limitation
3. Indemnification provisions
4. Release language
5. Naming of the State as a party

Article IV Compensation

Section 1. Limitations

Special Counsel shall be compensated only for the satisfactory performance of services provided as set forth in this Retention Agreement. Special Counsel

shall be compensated only in accordance with the express written provisions of this Retention Agreement and shall not receive reimbursement for expenses incurred in the performance of Special Counsel duties in accordance with the terms of this Retention Agreement.

Special Counsel shall not be compensated by any State Client or any other party for services performed hereunder. Special Counsel shall also not be compensated in excess of the amount expressed within this Retention Agreement.

Section 2. Compensation Fund

Pursuant to R.C. 109.08, Special Counsel will be compensated for services rendered through payment of a fee from funds collected by Special Counsel on a specific Claim, in an amount approved by the Attorney General. All moneys collected or received by Special Counsel relating to a Claim shall be forwarded to the Attorney General's Collection Enforcement Section. Upon receipt of such funds, the Attorney General shall calculate the fee payment due Special Counsel under this Retention Agreement and shall remit the same to Special Counsel, via direct deposit or electronic payment. In no event shall Special Counsel self-withhold or deduct its fees from funds received by it; fee payment shall only be made by the Attorney General.

Section 3. The Fee

A. The Formula

Any claim assigned to Special Counsel on or after the effective date of this Retention Agreement will be paid as follows:

The standard fee shall be thirty-three percent (33%) of the first Twenty-Five Thousand Dollars ($25,000) collected on any claim or account. Exceptions to the standard 33% fee are: Medicaid Estate Recovery and Medicaid Claims will be paid at twenty percent (20%); Ohio School District Tax Claims will be paid at twenty-one percent (21%); Ohio Department of Jobs and Family Services and University Claims will be paid at twenty-five percent (25%). Special Counsel will not be paid a fee on any collections resulting from any Federal or State offset program.

After the standard fee has been taken, the remaining fee will be paid on a sliding scale (see below). The Attorney General reserves the right to modify the standard fee on any new or future Claim in a writing delivered to Special Counsel.

Except as otherwise noted in Article IV, Section 3(B), the total amount paid to Special Counsel shall not exceed one-third (1/3) of the funds collected on a specific Claim.

For collection in excess of a Twenty-Five Thousand Dollars ($25,000), the fees shall be calculated as follows:

Amount of Collection	Fee Percentage (%)
$25,000.00-$99,999.99	7
$100,000.00-450,000.99	6
$451,000.00-$750,000.99	5
$751,000.00-$1,000,000.99	4
$1,000,000.00-$3,000,000.99	3
More than $3,000,000.00	2

The Attorney General will determine the payment method and schedule for compensation distributed to Special Counsel agrees to submit current bank account information and any authorizations necessary to facilitate electronic payments.

If the Retention Agreement is terminated without cause or expires, Special Counsel shall not receive a fee for collections received after the Termination Date.

B. Payment Installment Plans

If a payment plan, as defined by R.C. 131.02, has been established by Special Counsel with a debtor, fees for Special Counsel will be paid on each installment payment, so long as each payment is timely under the installment plan and the payment plan does not exceed five (5) years in length. Failure to make a timely payment under any installment plan constitutes a breach by the debtor.

Further, no payment plan established by Special Counsel shall exceed five (5) years in length without prior written approval from the Ohio Attorney General.

Article V SANCTIONS

If Special Counsel fails to perform its duties as outlined by this Retention Agreement and the Attorney General's policies and procedures, it will receive a notice in writing of non-compliance and may be subject to the following:

1. Required submission of monthly reports to the Director for review;

2. Required attendance at conferences with the Section Chief of the Collections Enforcement Section;
3. Suspension of the assignment of new Claims to Special Counsel; and/or
4. Termination of appointment and the return of all Claims assigned.

Special Counsel is required to cooperate fully with the policies and procedures outlined by the Attorney General.

Article VI OTHER TERMS AND CONDITIONS

Section 1. Equal Opportunity

In the hiring of employees for the performance of work under this Retention Agreement, Special Counsel agrees not to discriminate on the basis of race, color, religion, sex, age, national origin, military status, ancestry, disability, sexual orientation or gender identity, characteristics, or expression, against any citizen of the State of Ohio in the employment of a person qualified and available to perform the work to which this Retention Agreement relates.

Special Counsel further agrees not to discriminate against, intimidate, or retaliate against any employee hired for the performance of work under this Retention Agreement on account of race, color, religion, sex, age, national origin, military status, ancestry, disability, sexual orientation, or gender identity, characteristics or expression.

R.C. Section 125.111 requires any company doing business with the State of Ohio to maintain a written affirmative action program addressing employment

practices. The law further requires that this plan be filed annually with the Department of Administrative Services, Equal Opportunity Division, Special Counsel represents that it has a written affirmative action program and has filed a description of the affirmative action program with the Equal Opportunity Division of the Ohio Department of Administrative Services. Compliance and the liability for non-compliance with R.C. Section 125.111(B) is the sole responsibility of Special Counsel.

Section 2. Jurisdiction and Choice of law

This Retention Agreement and the rights of the Parties hereunder shall be governed, construed, and interpreted in accordance with the laws of the State of Ohio. Only Ohio courts shall have jurisdiction over any action or proceeding concerning the Retention Agreement and/or performance hereunder. Special Counsel hereby irrevocably consents to jurisdiction in a court of proper jurisdiction in Franklin County, Ohio.

Section 3. Termination

A. Termination by the Parties

The Attorney General reserves the right to modify or cancel the appointment and/or terminate this Retention Agreement at any time, in its sole discretion, and without cause or duty of explanation. Special Counsel may terminate this appointment and this Retention Agreement upon thirty (30) days' written notice to the Attorney General. If there is pending litigation, termination on the part of Special Counsel shall not be effective unless Special Counsel

first obtains leave of court to terminate its representation in the matter.

B. Compensation in the Event of Termination

In the event this Retention Agreement is terminated by either Party, or is not renewed upon its expiration, Special Counsel shall be compensated pursuant to Article IV hereof for claims collected and received prior to termination or non-renewal. Special Counsel shall not be entitled to any fee for any collections made or received, or any payment made by any debtor, after termination or non-renewal even if the collection or payment is made pursuant to a payment plan established by Special Counsel.

C. Transfer of Work

If Special Counsel is removed from any Claim, case or matter, or if this Retention Agreement is terminated or is not renewed upon expiration, then Special Counsel agrees to effectuate a speedy and efficient transfer of the work and to cooperate with the Director.

Special Counsel agrees to protect the State Client's interests in any transfer of work. Final payment to Special Counsel may be withheld if Special Counsel fails to transfer all files, documents, and materials when so requested by the Attorney General.

Section 4. Campaign Finance Compliance

Special Counsel hereby certifies that neither Special Counsel nor any of Special Counsel's partners, officers, directors, or shareholders, nor the spouses of any such persons, have made contributions in excess of the limitation in R.C. Section 3517.13.

This Retention Agreement shall be immediately null and void and any amounts paid to Special Counsel shall be fully recoverable by the State of Ohio if, on or after the date Special Counsel enters into this Retention Agreement any, of the applicable parties listed above make campaign contributions to the Attorney General or to the Attorney General's campaign committee in excess of the amounts specified in R.C. Section 3517.13.

Special Counsel shall, at all times, have a completed, notarized Affidavit of Eligibility on file with the Attorney General. Failure to provide a completed, notarized Affidavit of Eligibility will result in termination of the Special Counsel appointment.

Section 5. Employment Eligibility Verification

Special Counsel shall, at all times, have a completed Form I-9, Employment Eligibility Verification, on filed with the Director. Failure to provide a completed Form I-9, Employment Eligibility Verification, will result in termination of the Special Counsel appointment and this Retention Agreement.

Section 6. Compliance with Rules of Professional Conduct

Special Counsel represents and warrants that the attorneys listed on Special Counsel's RFQ Response are currently licensed to practice in, and in good standing before the bar of, the jurisdiction or jurisdictions listed on the RFQ Response (each an "**Admission Jurisdiction**"). If, during the appointment as Special Counsel, a complaint is issued against Special Counsel or any attorney providing services pursuant to this Retention Agreement, alleging a violation of the Supreme Court

Rules for the Government of the Bar of Ohio, or the applicable rules governing the state bar in any Admission Jurisdiction, or the Ohio Rules of Professional Conduct, then Special Counsel must give timely written notice, with a copy via email, of such complaint to the Director. Such notice must include the nature of the allegations set forth in the complaint.

The Attorney General retains the right, in his sole discretion, to immediately terminate this Retention Agreement if it deems the complaint may affect Special Counsel's ability to perform the duties required herein, or such disciplinary action somehow adversely affects the Attorney General, any State Client, or the State of Ohio. The Attorney General has the discretion to wait for the disposition of the complaint.

Section 7. Conflicts of Interest and Ethics Compliance

Special Counsel represents and warrants that, as of the date of this Retention Agreement, it is not engaged in any matter that it or may be adverse to the Attorney General, the State of Ohio or any State Clients. Special Counsel agrees that if a conflict of interest, potential or otherwise, arises pursuant to Rule 1.7 of the Ohio Rules of Professional Conduct, then Special Counsel will give timely written notice to the Director. Special Counsel must request and obtain a written waiver on a form acceptable to the Attorney General prior to undertaking representation adverse to the State of Ohio, its agencies, boards, department, commissions, colleges, universities, retirement systems or political subdivisions. Special Counsel must agree to and

execute all acknowledgments and/or conditions required by the Attorney General for any conflict waiver.

Special Counsel represents, warrants and certifies that it and its partners, associates, employees, and other persons assisting with the legal work contemplated by this Retention Agreement are knowledgeable of and understand the Ohio Ethics and Conflicts of Interest laws. Special Counsel further represents, warrants, and certifies that neither Special Counsel, nor any of its partners, associates, employees or other persons assisting with the legal work contemplated by this Retention Agreement will do any act that is inconsistent with such laws.

Section 8. Insurance

Special Counsel shall maintain, or cause to be maintained at no cost or expense to the Attorney General, adequate professional liability insurance in accordance with Gov. Bar R. III §4. If Special Counsel's malpractice policy does not cover acts of theft, embezzlement and/or lost funds, then Special Counsel shall procure and maintain, during the term of this Retention Agreement, liability insurance covering such losses in a form and with limits acceptable to the Attorney General. Unless otherwise stated, such insurance shall remain in force at all times from the date hereof through the term of this Retention Agreement, with companies authorized to do business in Ohio with an A.M. Best Rating of at least "A" unless otherwise approved in writing by the Attorney General.

A certificate reflecting the continuing coverage of all such policies procured by Special Counsel in

compliance herewith shall be delivered to the Director prior to undertaking any representation under this Retention Agreement and at least thirty (30) days prior to the expiration of any policies. Such insurance shall bear an endorsement stating that the insurer agrees to notify the Attorney General not less than thirty (30) days in advance of any proposed modification or cancellation of any such policy. Special Counsel warrants that it will comply with all conditions of each policy to assure that each policy is kept in full force and effect.

Any and all insurance claims must be made on a timely basis as required in the conditions of each policy.

Section 9. Indemnification

Special Counsel agrees to indemnify and hold the Attorney General and the State of Ohio harmless and immune from any and all claims for injury or damages arising from this Retention Agreement that are attributable to Special Counsel's own actions or omissions or those of its partners, associates, officers, employees, subcontractors, suppliers, third parties utilized by Special Counsel, or joint ventures while actin under this Retention Agreement. Such claims shall include any claims made under the Fair Labor Standards Act or under any other federal or state law involving wages, overtime, or employment matters and any claims involving collection activities. Special Counsel shall bear all costs associated with defending the Attorney General and the State of Ohio against any such claims.

Section 10. Findings for Recovery

Special Counsel warrants that it is not subject to an "unresolved" finding for recovery under R.C. 9.24. If the warranty is deemed to be false, this Retention Agreement is void *ab initio*, and Special Counsel must immediately repay to the State of Ohio any funds paid under this Retention Agreement.

Section 11. Drug Free Workplace

Special Counsel agrees to comply with all applicable federal, state, and local laws regarding smoke-free and drug-free work places and shall make a good faith effort to ensure that any and all of its employees or permitted subcontractors engaged in the work being performed hereunder do not purchase, transfer, use, or possess illegal drugs or abuse prescription drugs or alcohol in any way.

Section 12. Accounting/Financial

All payments collected by Special Counsel shall be made payable to the Ohio Treasurer of State. All payments received by Special Counsel shall be immediately forwarded to the Attorney General's Collections Enforcement Section, Lockbox #89471, 5575 Ventura Drive, Unit A, Parma, Ohio 44130. All payments received and sent to the Attorney General must have a bar code or account information. If a payment is made payable to Special Counsel, Special Counsel shall immediately negotiate and forward a check made payable to the Ohio Treasurer of State to the same address.

Special Counsel shall keep all financial records and other documents related to this Retention Agreement in a manner consistent with generally accepted accounting procedures. All records and related

documents shall be filed in a manner so that they are easily accessed and located. Special Counsel agrees to provide the Attorney General or its authorized agent with full access to examine documents, papers, and records involving the services to be performed under this Retention Agreement.

The Attorney General reserves the right to audit the financial and business records that are associated with the Attorney General's accounts and related cash receipts of Special Counsel to assure that proper reporting and remittance are submitted to the Attorney General. This audit may be performed by the Attorney General or its authorized agent, internal audit staff, independent accountants, or the Ohio Auditor of State. The expense of such audit shall be at the cost of the Attorney General unless the audit establishes grounds for termination of this Retention Agreement. In such case, the costs of the audit shall be payable to Special Counsel.

Special Counsel shall make its books and records available for inspection and audit during the period covered by this Retention Agreement and until the expiration of two (2) years after final payment under this Retention Agreement. The Attorney General shall only review and reconcile payments and fees two (2) years from the payment date. Any discrepancies in payments or fees beyond the two (2) year period will not be reviewed. Special Counsel will be responsible for costs incurred for storing and providing these records.

Section 13. Constituent Complaints

Special Counsel must conduct business in a manner that supports the Attorney General's goal of fair and equitable treatment of debtors during the collection

of debts. At a minimum, fair and equitable treatment means debt collection without harassment or verbal abuse of the debtor, or compromising the debtor's rights. The Attorney General expects Special Counsel to provide services to the public in a manner that will preserve or enhance goodwill between the public and the State of Ohio.

The Attorney General has zero tolerance for collection actions or activities that demonstrate anything less than complete respect for the rights and reasonable expectations of the public.

Special Counsel shall file and maintain with the Director of Special Counsel a written policy regarding customer service for its staff and personnel. An annual training session should be provided to its staff on customer service practices and any updated information regarding policy and procedures for the Claims assigned by the Attorney General.

Section 14. Compliance with Law

Special Counsel agrees to comply with all applicable federal, state, and local laws in the conduct of the work hereunder. Special Counsel accepts full responsibility for payment of all unemployment compensation insurance premiums, workers' compensation premiums, all income tax deductions, social security deductions, and any and all taxes or payroll deductions required for all employees engaged by Special Counsel in the performance of the work authorized and assigned. Special Counsel must furnish evidence of workers' compensation insurance coverage to the Director. In addition, Special Counsel must comply with the standards of behavior set forth

in the Truth in Lending Act, 15 USC 1601 et seq.; the Fair Credit Reporting Act, 15 USC 1681 et seq.; the Fair Debt Collection Practices Act, 15 USC 1692 et seq.; and any and all ancillary or collateral laws, regulations, and administrative laws that apply to the above.

Consistent with Article II, Section 3 of this Retention Agreement, Special Counsel agrees that no agency, employment, joint venture, or partnership has been or will be created between the parties hereto pursuant to the terms and conditions of this Retention Agreement. Special Counsel assumes all responsibility for any federal, state, municipal, or other tax liabilities, and insurance premiums which may accrue as a result of compensation received for services rendered hereunder.

Section 15. Technical Requirements

Special Counsel must have the type of equipment necessary for electronic information storage and must maintain security on this equipment, firewalls, and security processes as required by the Attorney General. Special Counsel must maintain the ability to transmit and receive electronic files and reporting and utilize standard file formats as determined by the Attorney General. Special Counsel shall maintain a disaster recovery plan to secure any information provided by the Attorney General.

At its own expense, Special Counsel shall provide all necessary computer equipment, including but not limited to scanners, terminals, printers, communication equipment, and telephone circuits needed to perform the services required by the Attorney General under this Retention Agreement and be responsible for all licensing fees, other

software costs, and other expenses related to the requirements of the Attorney General.

Special Counsel shall have secure access to the internet and must visit and use the Attorney General's extranet daily in connection with the work assigned pursuant to this Retention Agreement. Special Counsel must also access and update Client View in the notes section of each claim assigned to Special Counsel and/or provide an electronic file updating the Attorney General when working a Claim assigned by the Attorney General. All actions performed by Special Counsel must be documented on CUBS or ClientView. Special Counsel are encouraged to use Action Codes on Client View or CUBS.

Special Counsel shall be responsible for printing and mailing all letters generated during the collection process. Special Counsel is required to file the appropriate pleadings, including Notice of Appearance in each case.

Special Counsel is required to take at least five (5) hours of Continuing Legal Education (CLE) annually in the areas of collections, probate, or bankruptcy. Additional training will be provided by the Attorney General, and Special Counsel is required to attend. Special Counsel shall provide documentation of compliance with this CLE requirement.

Section 16. Declaration Regarding Material Assistance/Non-Assistance to a Terrorist Organization

Special Counsel hereby represents and warrants to the Attorney General and the State of Ohio that it has not provided any material assistance, as that

term is defined in R.C. Section 2909.33(C), to any organization identified by and included on the United States Department of State Terrorist Exclusion list and that it has truthfully answered "no" to every question on the "Declaration Regarding Material Assistance/Non-Assistance to a Terrorist Organization" (hereafter "**DMA**"). Special Counsel further represents and warrants that it has provided such to the Attorney General and the State of Ohio prior to execution of this Retention Agreement. If these representations and warranties are found to be false, this Retention Agreement is void *ab initio*, and the Special Counsel shall immediately repay to the State of Ohio any funds paid under this Retention Agreement.

Special Counsel shall, at all times, have a completed DMA on file with the Director. Failure to provide a completed DMA will result in termination of the Special Counsel appointment.

Further information regarding these forms and requirements may be found on the Ohio Homeland Security website at http://homelandsecurity.ohio.gov/dma/dma_forms.asp.

Section 17. Offshore Services

A. Executive Order Requirements

Special Counsel affirms to have read and understands Executive Order 2010-09S issued by Ohio Governor Ted Strickland and shall abide by those requirements in the performance of this Retention Agreement, and shall perform no services required under this Retention Agreement outside of the United States.

Special Counsel also affirms, understands, and agrees to immediately notify the Attorney General of any change or shift in the location(s) of services performed by Special Counsel or its subcontractors under this Retention Agreement, and no services shall be changed or shifted to a location(s) that are outside of the United States.

B. Termination, Sanction, Damages

If Special Counsel or any of its subcontractors perform services under this Retention Agreement outside of the United States, the performance of such services shall be treated as a material breach of the Retention Agreement. Neither the Client nor the Attorney General is obligated to pay and shall not pay for such services. If Special Counsel or any of its subcontractors perform any such services, Special Counsel shall immediately return to the Attorney General or Client all funds paid for those services. The Attorney General and the Client may also recover from Special Counsel all costs associated with any corrective action the Attorney General or the Client may undertake, including but not limited to an audit or a risk analysts, as a result of Special Counsel performing services outside the United States.

The Attorney General may, at any time after the breach, terminate the Retention Agreement, upon written notice to Special Counsel. The Attorney General may recover all accounting, administrative, legal and other expenses reasonably necessary for the preparation of the termination of the Retention Agreement and costs associated with the acquisition of substitute services from a third party.

If the Attorney General determines that actual and direct damages are uncertain or difficult to ascertain, the Attorney General and the Client, in the Attorney General's sale discretion may recover a payment of liquidated damages in the amount of 10% of the value of the Retention Agreement.

The Attorney General, in its sale discretion, may provide written notice to Special Counsel of a breach and permit Special Counsel to cure the breach. Such cure period shall be no longer than twenty-one (21) calendar days. During the cure period, the Attorney General and the Client may buy substitute services from a third party and recover from the Special Counsel any costs associated with acquiring those substitute services.

Notwithstanding the Attorney General permitting a period of time to cure the breach or the Special Counsel's cure of the breach, the Attorney General does not waive any of its rights and remedies provided the Attorney General in this Retention Agreement, including but not limited to recovery of funds paid for services Special Counsel performed outside of the United States, costs associated with corrective action, or liquidated damages.

Section 18. Miscellaneous

A. Counterparts

This Retention Agreement may be executed in one or more counterpart(s), each of which shall be an original and all of which shall constitute one and the same instrument.

B. Severability of Terms and Conditions

If any provision of this Retention Agreement shall be held invalid, illegal, or unenforceable in any respect, said provision shall be severed. The validity, legality and enforceability of all other provisions of this Retention Agreement shall not in any way be affected or impaired unless such severance would cause this Retention Agreement to fail of its essential purpose.

C. Waiver of Terms and Conditions

Failure to enforce or insist on compliance with any of the terms and conditions of this Retention Agreement by the Attorney General shall not constitute a waiver or relinquishment of any such term or condition of the Retention Agreement on the part of the Attorney General but the same shall remain at all times in full force and effect.

D. Entire Agreement / Integration

This Retention Agreement incorporates the Request for Qualifications for Collections Special Counsel issued March 21, 2011 (the RFQ) and Special Counsel's response to the RFQ by reference, This Agreement, including exhibits and documents incorporated by reference, constitutes the entire understanding of the Parties. Both Parties agree that there is no other understanding or agreement other than the terms expressly stated herein.

E. Amendment or Modification

No amendment or modification of this Retention Agreement shall be effective against either Party unless such amendment or modification is set forth in writing and signed by both Parties.

F. Headings

The headings herein are for reference and convenience only. They are not intended and shall not be construed to be a substantive part of this Retention Agreement or in any other way to affect the validity, construction or interpretation of any of the provisions of this Retention Agreement.

[Remainder of Page Intentionally left Blank]

The undersigned represent that they are authorized to enter into this Limited Retention Agreement. The undersigned acknowledge they have read and understand all terms set forth herein. By affixing their signatures below, the Parties evidence their intent to be bound hereto.

OHIO ATTORNEY GENERAL

By: _____

Name: _____

Title: _____

Date: _____

[SPECIAL COUNSEL]

By: _____

Name: _____

Title: _____

Date: _____

Address: _____

_____

Doc. 48-8 **EXHIBIT C3**

FISCAL YEAR 2013 RETENTION AGREEMENT COLLECTIONS SPECIAL COUNSEL Appointed by Ohio Attorney General Mike DeWine

This Retention Agreement for Special Counsel (hereinafter "Retention Agreement" or "Agreement") is entered into by and between the Ohio Attorney General and the undersigned Special Counsel, an attorney licensed to practice law in Ohio.

Article I RECITALS

Whereas, the Attorney General, pursuant to Ohio Revised Code Section 109.08, is empowered to appoint Special Counsel to represent the State in civil actions, criminal prosecutions, or other proceedings in which the State is a party or directly interested; and

Whereas, the purpose of this Retention Agreement is to set forth the rules and procedures for the appointment and retention of Special Counsel who shall provide legal services to the State of Ohio relating to the collection of public moneys due to the State.

Now therefore, in consideration for the mutual promises and covenants set forth herein and for other valuable consideration, the sufficiency of which is agreed to by the parties hereto, the Attorney General and Special Counsel (individually referred to as the "Party", collectively "the Parties") hereby agree as follows:

Article II TERM

The term of this Retention Agreement shall begin on July 1, 2012 and shall terminate on June 30, 2013, unless terminated by the Attorney General, as set forth herein, or as a result of the completion of all work for the assignment ("Termination"). No services rendered by Special Counsel after the date of Termination shall be authorized or payable without an additional agreement from the Attorney General.

Article III SERVICE

Section 1 Scope of Appointment

Special Counsel and its employees shall conduct any and all legal and collection work assigned by the Attorney General. Both Parties recognize that the appointment of Special Counsel is personal in nature and does not extend to any law firm that the Special Counsel is associated with, a partner of, or for which Special Counsel serves as "of counsel." There shall be only one Special Counsel appointed in a law firm.

Work hereunder shall be performed in a professional manner consistent with the accepted standards for practice in the legal profession including, but not limited to, the Ohio Supreme Court Rules for Government of the Bar and the Ohio Rules of Professional Conduct.

In view of the personal nature of the services to be rendered under this appointment, the Attorney General's Office or its designee shall be the sole judge of the adequacy of those services.

Section 2 Delegation of Work

Special Counsel may, only with the express written consent of the Attorney General, delegate legal work

to another attorney outside the firm with which the Special Counsel is affiliated. Such Attorney must have qualifications and experience similar to the Special Counsel and shall work under the supervision and control of the Special Counsel. Although delegation may be permitted as provided herein, delegation shall not relieve Special Counsel of any responsibility or liability for the work performed hereunder. In the event that Special Counsel delegates work to other attorneys in other firms, the compensation of attorneys shall be a matter beyond the scope of this Retention Agreement to be negotiated in writing between the Special Counsel and those attorneys prior to the commencement of any work by the firm to whom the work is delegated and shall be paid by Special Counsel. A copy of such compensation agreement shall be filed with the Director of Special Counsel in the Collections Enforcement Section.

The delegation of work described above is the only delegation permitted under this Agreement. Under no other circumstances may Special Counsel subcontract, forward, assign, or otherwise delegate work assigned by the Attorney General to any other individual or entity. All work pursuant to this Agreement shall be conducted by employees of Special Counsel's law firm.

Section 3 Attorney-Client Relationship

The Attorney General is the chief law officer of the State of Ohio and, as such, is the legal representative of the State, including its various agencies, boards, commissions, departments, colleges, universities, political subdivisions and retirement systems (collectively, the "State Clients"). Special Counsel is

being appointed hereunder to provide legal services on behalf of the Attorney General to assist in the collection of past due debt. Special Counsel will render services pursuant to this appointment as an independent contractor. No Special Counsel, whether for purpose of applications of Ohio Revised Code Chapter 102, R.C. 9.86 or 9.87 or for any other purpose, shall be regarded as in the employment of, or as an employee of, the Attorney General or the State Clients.

In all pleadings, notices and/or correspondence created pursuant to the work being performed hereunder, Special Counsel shall indicate that such document is prepared by the Special Counsel in its position as Special Counsel for the Attorney General.

During the term of this appointment, Special Counsel shall be engaged by the Attorney General solely on an independent contractor basis, and Special Counsel shall therefore be responsible for all Special Counsel's business expenses, including, but not limited to, employees' wages and salaries, insurance of every type and description, and all business and personal taxes, including income and Social Security taxes and contributions for Worker's Compensation and Unemployment Compensation, if any. Special Counsel shall not print business cards using the Attorney General's logo.

Section 4 Claim Assignment

For the purposes of this Retention Agreement, a claim or an account or a record is a debt due the State of Ohio or a political subdivision. Should Special Counsel receive assignment of a claim(s) from the Attorney General, Collections Enforcement Section, such assignments will be transferred

electronically and are subject to the provisions of this Retention Agreement.

Special Counsel that substantially increases the collections of its assigned claims, while maintaining quality customer service, may be eligible to have an increase in the number of claims assignments made by the Attorney General's Office. Special Counsel who is not successful may have a decrease in assignments or termination. Special Counsel agrees to abide by all policies and procedures promulgated by the Attorney General relating to collection of claims.

Section 5 Specific Performance Measures

A personal performance review may be conducted on all Special Counsel at the discretion of the Attorney General. Performance reviews may include, but are not limited to, the following areas: collection ratios, performance measures based on historical averages and comparisons of new and old accounts and various account types, customer service complaints, compliance with Attorney General policies, reports, legal actions taken, status updates, and interviews. The Attorney General may communicate in writing any additional specific performance review requirements.

As a result of this review, Special Counsel's inventory of claims may be increased or decreased, the Agreement terminated, or any other sanction contained in Article VII may be imposed at the sole discretion of the Attorney General.

Special Counsel will be afforded an opportunity to confer with the Attorney General's Office on any significant issues resulting from the Special Counsel

performance reviews. If requested, Special Counsel agrees to provide the Attorney General or his authorized agent access to all documents, papers, records, and/or computer searches involving the services to be performed under this Agreement, including all documents required by this Agreement.

Section 6 Noteworthy Matters

Special Counsel agrees to consult either orally or in written format, with the Director of Special Counsel in the Collections Enforcement Section as soon as possible on all matters arising out of, or related to, Special Counsel's work hereunder that may be controversial, high profile, or otherwise noteworthy.

A matter is deemed noteworthy if it has the potential for drawing media attention, involves a significant change in the law or injunctive relief that would be extremely detrimental to the State, is particularly controversial, is an appeal or defense of an appeal, or involves a settlement in excess of **$500,000**. It is considered noteworthy if Special Counsel is sued in any court of law where he/she is named or his/her firm is named as a defendant.

Upon the filing of any pleading in a noteworthy matter, as defined herein, Special Counsel shall provide a time-stamped copy of such filing to the Director of Special Counsel in the Collections Enforcement Section.

Section 7 Media Statements

The Parties agree that neither Special Counsel, nor any partner, associate, employee, or any other person assisting with the legal work contemplated by this Retention Agreement, shall publish any material, including online publications, or speak to or

otherwise communicate with any representative of a television station, radio station, newspaper, magazine, website, or any other media outlet concerning the work outlined or contemplated by this Agreement without first obtaining approval of the Section Chief of the Collections Enforcement Section and/or the Director of Communications of the Attorney General's Office. Special Counsel shall not speak on behalf of the Ohio Attorney General to any member of the news media.

Section 8 Public Records Act/Confidentiality

Special Counsel shall describe and provide all material commissioned or gathered by Special Counsel or in Special Counsel's possession that fulfills an obligation of the Appointment, including names and addresses of potential witnesses. All such material shall be considered property of the State of Ohio. Special Counsel agrees to adhere to R.C. 149.43 and maintain all public records in accordance with state law.

Special Counsel shall consult with and obtain the approval of the Chief of the Collections Enforcement Section before responding to any public records request. Moreover, Special Counsel shall not disclose any information obtained in performing its services hereunder in violation of any state or federal law, including, but not limited to, the Family Educational Rights and Privacy Act ("FERPA") and/or the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), as the same may be amended or modified from time to time. Special Counsel must also submit signed FERPA and HIPAA Acknowledgments, if applicable to the scope of representation, to the Attorney General at the time of execution of this

Agreement (copies attached to and incorporated herein).

Special Counsel acknowledges its obligation to hold in confidence sensitive and confidential information provided by the Attorney General pursuant to this agreement and will agree to take reasonable security measures. Special Counsel shall not discuss or disclose any information or material obtained pursuant to its obligations under this Agreement without the prior written consent of the Attorney General. Special Counsel shall instruct in writing Special Counsel's employees to use a high degree of care to keep confidential all information concerning the State of Ohio's client data, its business, its financial affairs, the relations with its citizens and its employees, as well as any other information which may be specifically classified as confidential in writing by the Attorney General. All provisions of this Agreement relating to "confidentiality" shall remain binding upon Special Counsel at the expiration of this Agreement or in the event of termination. Special Counsel and its employees must also submit a signed Confidentiality Agreement to the Attorney General at the time of execution of this Agreement (copy attached to and incorporated herein).

Special Counsel must maintain and file with the Director of Special Counsel in the Collections Enforcement Section a written policy and enforced practice for the safeguarding of a debtor's identity, including social security numbers, identification number, and other information that could be used to debtor's disadvantage. This policy must include secure destruction of data under supervision, as well

as the enforced prohibition of the unauthorized acquisition or retention of information by support staff and personnel, including social security numbers. Counsel must submit a copy of this policy to the Attorney General at the time of execution of this Agreement. Special Counsel must also submit a signed Non-AGO Network Access User Agreement, Confidentiality Agreement (as required above), and other documents as deemed necessary by the Attorney General to safeguard the information under its guardianship, at the time of execution of this Agreement (copies attached to and incorporated herein).

Section 9 Correspondence

Any notice required under this Retention Agreement shall be made in writing and shall be accomplished by personal delivery or by United States Certified mail, return receipt requested, postage prepaid, addressed to the other Party. Such notice shall be addressed to the Section Chief of Collections Enforcement in the Attorney General's Office and mailed to 150 E. Gay St., 21st Floor, Columbus, OH 43215 or such other address as it may hereafter designate in writing. Notice to Special Counsel shall be to the person and at the address provided below by personal delivery or by United States Certified mail, return receipt requested, postage prepaid:

_____

Name

_____

Title

_____

Address

_____

City/State/Zip

Article IV Settlements

Section 1 Settlements

The Attorney General encourages negotiations or attempts to settle assigned claims. Special Counsel understands and agrees that the initiation of litigation on behalf of the State and all final settlements must receive the prior approval of the Attorney General. Special Counsel shall confer with the Attorney General's office on the waiver of interest.

Special Counsel shall confer with the Section Chief of Collections Enforcement or her designee in the Attorney General's Office early in the settlement negotiation process. Specifically, Special Counsel agrees to confer with the Attorney General's Office about the following matters when applicable:

1. Confidentiality provisions in settlement agreements
2. The Ohio Constitutions biennial limitation
3. Indemnification provisions
4. Release language
5. Naming of the State as a party

Article V COMPENSATION

Section 1 Limitations

Special Counsel shall be compensated only for the satisfactory performance of services provided as set forth in the Retention Agreement. Special Counsel shall be compensated only in accordance with the

express written provisions of this Retention Agreement and shall not receive reimbursement for expenses incurred in the performance of Special Counsel duties in accordance with the terms of this Retention Agreement.

Special Counsel shall not be compensated by another party for services performed hereunder. Special Counsel shall also not be compensated in excess of the amount expressed within this Retention Agreement.

Section 2 Compensation Fund

Pursuant to R.C. 109.08, Special Counsel will be compensated for services rendered through payment of a fee from funds collected by Special Counsel on a specific claim, in an amount approved by the Ohio Attorney General or his designee. All moneys collected or received by Special Counsel relating to a claim shall be forwarded to the Ohio Attorney General's Office. Upon receipt of such funds, Attorney General's Office shall calculate the fee payment due Special Counsel under this Agreement and shall remit the same to Special Counsel. In no event shall Special Counsel withhold or deduct its fee from funds received by it. Fee payment shall only be made by the Attorney General.

Section 3 The Fee

A. The Formula

Any assignments or accounts assigned to Special Counsel **on or after the effective date of this Retention Agreement or on or after September 12, 2007** will be paid as follows:

The standard fee shall be thirty-three percent (33%) of the first twenty five thousand dollars ($25,000) collected on any claim or account. After the standard fee has been taken, the remaining fee will be paid on a sliding scale (see below). The Attorney General reserves the right to modify the standard fee in a writing delivered to Special Counsel.

Except as otherwise noted in Article IV, Section 3(B), the total amount paid to Special Counsel shall not exceed one-third (1/3) of the funds collected on a specific claim.

For collection in excess of $25,000, the fees shall be calculated as follows:

Amount of Collection	Fee Percentage (%)
$25,000-$99,999	7
$100,000-$450,999	6
$451,000-$750,999	5
$751,000-$999,999	4
$1,000,000-$2,999,999	3
More than $3,000,000	2

Exceptions to the standard 33% fee and sliding scale are: Medicaid Estate Recovery be paid at a flat twenty percent (20%); Ohio School District Tax will be paid at a flat twenty-one percent (21%); Ohio Department of Jobs and Family Services and University Claims will be paid at a flat twenty-five percent (25%). Special Counsel will not be paid a fee on any collections resulting from any Federal or State offset program, including unclaimed funds.

The Ohio Attorney General's Office will determine the payment method and schedule for compensation distributed to Special Counsel.

Any assignments or accounts to Special Counsel which were assigned **prior to September 12, 2007** will be paid as follows:

The standard fee shall be 33% of the first thirty thousand ($30,000) collected and ten percent (10%) of any additional amounts collected on a specific claim. The exception to this fee schedule is as follows: Medicaid Estate Recovery and Medicaid cases will be paid at a flat twenty percent (20%); Ohio Department of Jobs and Family Services will be paid at a flat twenty-five per cent (25%); and University claims will be paid at a flat thirty-one percent (31%) and a flat 10% on any amounts over $35,000. Except as otherwise provided in Article IV, Section 3(B), the total amount paid to Special Counsel shall not exceed one third (1/3) of the funds collected on a specific claim.

B. Payment Installment Plans

If a payment plan, as defined by R.C. 131.02, has been established by Special Counsel with the debtor, fees for Special Counsel will be paid on each installment payment, so long as each payment is timely under the installment plan and the payment plan does not exceed five years in length. Failure to make a timely payment under any installment payment plan constitutes a breach by the debtor.

Further, no payment plan established by the Special Counsel shall exceed five years in length without prior written approval from the Chief of

the Collections Enforcement Section. If the Retention Agreement is terminated or expires, Special Counsel shall not receive a fee for collections received after the date of termination or the expiration of the Retention Agreement.

Article VI OTHER TERMS AND CONDITIONS

Section 1 Counterparts

This Retention Agreement may be executed in one or more counterparts, each of which shall be an original and all of which constitute one and the same instrument.

Section 2 Severability of Terms and Conditions

If any provision of this Retention Agreement shall be held invalid, illegal, or unenforceable in any respect, said provision shall be severed.

The validity, legality, and enforceability of all other provisions of this Retention Agreement shall not be affected or impaired unless such severance would cause this Retention Agreement to fail of its essential purpose.

Section 3 Equal Opportunity

In the hiring of employees for the performance of work under this Agreement, Special Counsel agrees not to discriminate on the basis of race, color, religion, sex, age, disability, military status, national origin, ancestry, sexual orientation or gender identity, characteristics or expression against any citizen of this state in the employment of a person qualified and available to perform the work to which this Retention Agreement relates.

Special Counsel further agrees not to discriminate against, intimidate, or retaliate against any employee hired for the performance of work under this Agreement on account of race, color, religion, sex, age, military status, disability, national origin, ancestry, sexual orientation or gender identity, characteristics or expression.

R.C. 125.111 requires any company doing business with the State of Ohio to maintain a written affirmative action program addressing employment practices. The law further requires that this plan be filed annually with the Department of Administrative Services, Equal Opportunity Division. Special Counsel represents that it has a written affirmative action program and has filed a description of the affirmative action plan and a progress report on its implementation with the Equal Opportunity Division of the Department of Administrative Services. Compliance, and the liability for non-compliance with R.C. 125.111(B), is the sole responsibility of Special Counsel.

Section 4 Entire Agreement/Integration

The Request for Qualifications for Collections Special Counsel, Fiscal Year 2013 ("RFQ") and Special Counsel's RFQ Responses are hereby incorporated by reference into this Retention Agreement. This Retention Agreement, including exhibits and documents incorporated by reference, constitutes the entire understanding of the Parties. In the event of a conflict between the terms of the body of this Agreement and any exhibits or between the terms of this Agreement and the RFQ or Special Counsel's response to the RFQ, the body of this Agreement will control. Both Parties agree that there

is no other understanding or agreement other than the terms expressly stated herein.

Section 5 Amendment or Modification

No amendment or modification of this Retention Agreement shall be effective against either Party unless such amendment or modification is set forth in writing and signed by both Parties.

Section 6 Waiver of Terms and Conditions

Failure to enforce or insist on compliance with any of the terms and conditions of this Retention Agreement by the Attorney General shall not constitute a waiver or relinquishment of any such term or condition of the Retention Agreement on the part of the Attorney General but the same shall remain at all times in full force and effect.

Section 7 Venue, Jurisdiction and Choice of Law

This Retention Agreement and the rights of the Parties hereunder shall be governed, construed, and interpreted in accordance with the laws of the State of Ohio. Any action or proceeding arising from or concerning this Retention Agreement and/or performance hereunder shall be subject to the exclusive jurisdiction of the state and/or federal courts located in Franklin County, Ohio. Special Counsel hereby irrevocably consents to such jurisdiction and venue in Franklin County, Ohio.

Section 8 Termination

A. Termination by the Parties

The Attorney General reserves the right to modify or cancel the Appointment and/or terminate

this Retention Agreement at any time, in his sole discretion, and without cause or duty of explanation upon written notice to Special Counsel. If there is pending litigation, termination on the part of Special Counsel shall be effective when Special Counsel obtains leave of court to terminate its representation in the matter. Special Counsel must notify the Director of Special Counsel in writing of all pending litigation matters immediately upon termination.

Special Counsel may terminate the Appointment and this Retention Agreement upon thirty (30) days written notice to the Director of Special Counsel in the Collections Enforcement Section.

B. Compensation upon Termination

In the event this Retention Agreement is terminated by either Party, or is not renewed upon the expiration of its term, Special Counsel shall be compensated for claims collected and received prior to termination or non-renewal. Special Counsel shall not be entitled to any fee for any collections made or received, or any payment made by the debtor, after termination or non-renewal even if the collection or payment is made pursuant to a payment plan established by Special Counsel.

C. Transfer of Work

If Special Counsel is removed from any claim, case or matter, or if this Retention Agreement is terminated or is not renewed upon expiration, then Special Counsel agrees to effectuate a speedy and efficient transfer of the work and to cooperate with the Director of Special Counsel in the Collections Enforcement Section.

Special Counsel agrees to protect the client's interests in any transfer of work. Final payment to Special Counsel may be withheld if Special Counsel fails to transfer all files, documents, and materials when so requested by the Ohio Attorney General's Office.

Section 9 Campaign Finance Compliance

Special Counsel hereby certifies that neither Special Counsel nor any of Special Counsel's partners, officers, directors, shareholders, nor the spouses of any such person, have made contributions in excess of the limitations specified in R.C. 3517.13.

This Retention Agreement shall be immediately null and void and any amounts paid to Special Counsel shall be fully recoverable by the State of Ohio if, on or after the date Special Counsel enters into this Retention Agreement, any of the applicable parties listed above have made campaign contributions to the holder of the public office having ultimate responsibility for the award of the contract or to the public officer's campaign committee in excess of the amounts specified in R.C. 3517.13.

Special Counsel shall, at all times, have a completed Affidavit of Eligibility on file with the Ohio Attorney General's Office. Failure to provide a completed Affidavit of Eligibility may result in termination of the Special Counsel appointment.

Special Counsel shall, at all times, have a completed Form I-9, Employment Eligibility Verification on file with the Ohio Attorney General's Office, Director of Special Counsel in the Collections Enforcement Section. Failure to provide a completed Form I-9, Employment Eligibility Verification may

result in termination of the Special Counsel appointment.

Section 10 Ohio Rules of Professional Conduct

If, during the appointment as Special Counsel, a complaint is issued against Special Counsel, Special Counsel's firm, or any attorney within Special Counsel's firm alleging a violation of the Supreme Court Rules for the Government of the Bar of Ohio, or the applicable rules (especially 1.7 through 1.11) governing the state bar in which Special Counsel has been admitted, or the Rules of Professional Conduct, then Special Counsel will give written notice, 15 days from the date of the filing of the complaint to the Chief of the Collections Enforcement Section. Such notice must include the nature of the allegations set forth in the complaint.

The Attorney General retains the right, in his sole discretion, to immediately terminate this Retention Agreement if he deems the complaint may affect Special Counsel's ability to perform the duties required herein, or such disciplinary action somehow adversely affects the Attorney General, the State Client, or the State of Ohio. The Attorney General has the discretion to wait for the disposition of the complaint.

Section 11 Conflicts of Interest and Ethics Compliance

Special Counsel represents and warrants that at the date of this Agreement, it has no conflict of interest in undertaking its representation hereunder. Special Counsel agrees that if a conflict of interest, potential or otherwise, arises pursuant to Rule 1.6 and 1.7 of the Ohio Rules of Professional Conduct,

then Special Counsel will give timely written notice to the Chief of the Collections Enforcement Section at Special Counsel Waivers@OhioAttorneyGeneral.gov. Special Counsel must request and obtain a written waiver prior to undertaking representation adverse to the State of Ohio, its offices, board, departments, institutions, or political subdivisions that certify debt to the Attorney General's Office.

Special Counsel represents, warrants, and certifies that it and its partners, associates, employees, and other persons assisting with the legal work contemplated by this Retention Agreement are knowledgeable of and understand the Ohio Ethics and Conflicts of Interest laws. Special Counsel further represents, warrants, and certifies that neither Special Counsel, nor any of its partners, associates, employees, or other persons assisting with the legal work contemplated by this Retention Agreement, will do any act that is inconsistent with such laws.

Section 12 Headings

The headings herein are for reference and convenience only. They are not intended and shall not be construed to be a substantive part of this Retention Agreement or in any other way to affect the validity, construction, interpretation, or effect of any of the provisions of this Retention Agreement.

Section 13 Insurance

Special Counsel shall, at its own expense, procure and maintain, during the term of this Agreement, malpractice insurance. If Special Counsel's malpractice policy does not cover acts of theft, embezzlement and/or lost funds, then Special

Counsel shall procure and maintain, during the term of this Retention Agreement, liability insurance covering such losses in a form and with limits acceptable to the Attorney General. Such liability insurance shall be written by a company or companies authorized to engage in the business of general liability insurance in the State of Ohio with an A.M. Best rating of at least "A" or be otherwise approved in writing by the Attorney General. A certificate reflecting the continuing coverage of all such policies procured by Special Counsel in compliance herewith shall be delivered to the Director of Special Counsel in the Collections Enforcement Section prior to undertaking any representation under this Retention Agreement and for at least thirty (30) days prior to the expiration of any policies. Such insurance shall bear an endorsement stating that the insurer agrees to notify the Chief of the Collections Enforcement Section not less than thirty (30) days in advance of any proposed modification or cancellation of any such policy. Special Counsel agrees to carry adequate professional liability insurance, and otherwise comply with Gov. Bar R. III §4.

Section 14 Indemnification

Special Counsel agrees to indemnify and to hold the Attorney General and the State of Ohio harmless and immune from any and all claims for injury or damages arising from this Retention Agreement that are attributable to Special Counsel's own actions or omissions or those of his/her partners, associates, officers, employees, subcontractors, suppliers, third parties utilized by Special Counsel, or joint ventures while acting under this Retention Agreement. Such

claims shall include any claims made under the Fair Labor Standards Act or under any other federal or state law involving wages, overtime, or employment matters and any claims involving collection activities. Special Counsel shall bear all costs associated with defending the Attorney General and/or any State Client against any such claims.

Section 15 Findings for Recovery

Special Counsel warrants that he/she is not subject to an "unresolved" finding for recovery under R.C. 9.24. If the warranty is deemed to be false, this Agreement is void *ab initio,* and Special Counsel may be required to immediately repay to the State any funds paid under this Retention Agreement.

Section 16 Drug Free Workplace

Special Counsel agrees to comply with all applicable federal, state, and local laws regarding smoke-free and drug-free work places and shall make a good faith effort to ensure that any and all of its employees or permitted subcontractors engaged in the work being performed hereunder do not purchase, transfer, use, or possess illegal drugs or abuse prescription drugs or alcohol in any way.

Section 17 Accounting/Financial

All payments collected by Special Counsel shall be made payable to the Ohio Treasurer of State. **Restrictively endorsed payments and/or payments accompanied by documents that contain restrictive endorsement language shall be immediately forwarded to the Collections Enforcement Section at 150 E. Gay St., 21st Floor, Columbus, OH 43215.** All other payments received by Special Counsel, including those made

payable to Special Counsel, shall be immediately forwarded to the Collections Enforcement Lock Box.

Special Counsel shall keep all financial records and other documents related to this Retention Agreement in a manner consistent with generally accepted accounting principles and Attorney General policies. All records and related documents shall be filed in a manner so that they are easily accessed and located. Special Counsel agrees to provide the Ohio Attorney General or his authorized agent with full access to examine documents, papers, and records involving the services to be performed under this Retention Agreement.

The Attorney General's Office reserves the right to audit the financial and business records that are associated with the Attorney General's Office accounts and related cash receipts of Special Counsel to assure that proper reporting and remittance are submitted to the Attorney General's Office. This audit may be performed by the Ohio Attorney General or his authorized agent, internal audit staff, independent accountants, or the Ohio Auditor of State. The expense of such audit shall be at the cost of the Attorney General's Office unless the audit establishes grounds for termination of the contract. In such case, the costs of the audit shall be payable by Special Counsel.

Special Counsel shall make its books and records available for inspection and audit during the period covered by this Retention Agreement and until the expiration of two (2) years after final payment under the Retention Agreement. Special Counsel will be responsible for costs incurred for storing and providing these records.

Section 18 Constituent Complaints

Special Counsel must conduct business in a manner that supports the Ohio Attorney General's goal of fair and equitable treatment of debtors during the collection of debts. At a minimum, fair and equitable treatment means debt collection without harassment or verbal abuse of the debtor, or compromising the debtor's rights. The Attorney General expects Special Counsel to provide services to the public in a manner that will preserve or enhance goodwill between the public and the State of Ohio.

The Attorney General's Office has zero tolerance for collection actions or activities that demonstrate anything less than complete respect for the rights and reasonable expectations of the public.

Special Counsel shall file and maintain with the Director of Special Counsel in the Collections Enforcement Section a written policy regarding customer service for his/her staff and personnel. An annual training session should be provided to his/her staff on customer service practices and any updated information regarding policy and procedures for the accounts assigned by the Attorney General's Office.

Section 19 Compliance with Law

Special Counsel agrees to comply with all applicable federal, state, and local laws in the conduct of the work hereunder. Special Counsel accepts full responsibility for payment of all unemployment compensation insurance premiums, workers' compensation premiums, all income tax deductions, social security deductions, and any and

all taxes or payroll deductions required for all employees engaged by Special Counsel in the performance of the work authorized and assigned. Special Counsel must furnish evidence of workers' compensation insurance coverage to the Director of Special Counsel in the Collections Enforcement Section. In addition, Special Counsel must comply with the same standards of behavior as set forth in the Truth in Lending Act, 15 USC 1601 et seq.; the Fair Credit Reporting Act, 15 USC 1681 et seq.; and the Fair Debt Collection Practices Act, 15 USC 1692 et seq.; and any and all ancillary or collateral laws, regulations or administrative laws that apply to the above. Failure to comply with this provision will result in sanctions allowed by law and in this Agreement.

Consistent with Article III, Section 3 of this Agreement, Special Counsel agrees that no agency, employment, joint venture, or partnership has been or will be created between the Parties hereto pursuant to the terms and conditions of this Retention Agreement. Special Counsel assumes all responsibility for any federal, state, municipal, or other tax liabilities, and insurance premiums which may accrue as a result of compensation received for services rendered hereunder.

Section 20 Technical Requirements

Special Counsel must have the type of equipment necessary for electronic information storage, including a separate server to store Attorney General records, and maintain security on this equipment, firewalls and security processes as required by the Attorney General's Office. Special Counsel must maintain the ability to transmit and receive

electronic files and reporting and utilize standard file formats as determined by the Attorney General's Office.

At its own expense, Special Counsel shall provide all necessary computer equipment, including but not limited to scanners, terminals, printers, communication equipment, and telephone circuits needed to perform the services required by the Attorney General's Office under this Agreement and be responsible for all licensing fees, other software costs, and other expenses related to the requirements of the Attorney General's Office.

Special Counsel shall have secure access to the internet and must visit and use the Attorney General's Extranet daily in connection with the work assigned pursuant to this Retention Agreement. Special Counsel must also access and update Client View in the notes section of each account assigned to Special Counsel and/or provide an electronic file updating the Attorney General when working an account assigned from the Attorney General. All actions performed by Special Counsel must be documented on CUBS, the Attorney General collection system, and/or Client View. Special Counsel shall use Action Codes on Client View, CUBS, and/or the Attorney General collection system.

Special Counsel shall be responsible for printing and mailing all letters generated during the collection process. Special Counsel is required to file the appropriate pleadings, including Notice of Appearance in each case.

Special Counsel is required to complete at least 5 hours of Continuing Legal Education annually in the

areas of collections, probate, or bankruptcy. Additional training will be provided by the Attorney General, and Special Counsel is required to attend.

Section 21 Declaration Regarding Material Assistance/Non-Assistance to a Terrorist Organization

Special Counsel hereby represents and warrants to the Attorney General and the State of Ohio that it has not provided any material assistance, as that term is defined in R.C. 2909.33(C), to any organization identified by and included on the United States Department of State Terrorist Exclusion list and that it has truthfully answered "no" to every question on the "Declaration Regarding Material Assistance/Non-assistance to a Terrorist Organization." Special Counsel further represents and warrants that it has provided or will provide such declaration to the Attorney General and the State of Ohio prior to execution of this Retention Agreement. If these representations and warranties are found to be false, this Retention Agreement is void *ab initio* and the Special Counsel shall immediately repay to the Attorney General or the State of Ohio any funds paid under this Retention Agreement.

Special Counsel shall, at all times, have a completed Declaration Regarding Material Assistance/Non-Assistance to a Terrorist Organization form on file with the Director of Special Counsel in the Collections Enforcement Section. Failure to provide a completed Declaration Regarding Material Assistance/Non-Assistance to a Terrorist Organization form will result in termination of the Special Counsel appointment.

Further information regarding these forms and requirements may be found on the website at: http://www.homelandsecurity.ohio.gov/dma.asp.

Section 22 Ohio Retirement System Retirant

If Special Counsel is a PERS retirant, as such term is defined by R.C. 145.38, Special Counsel shall notify the Attorney General of such status in writing prior to the commencement of work under this Agreement. Notices pursuant to this Paragraph shall be sent to the Attorney General's Director of Human Resources by mail at 30 E. Broad Street, 16th Floor, Columbus, Ohio 43215, by fax at (614) 728-7582, or by email at HR@OhioAttorneyGeneral.gov. The Attorney General shall not be responsible for any changes to Special Counsel's retirement benefits that may result from entering into this Agreement.

Article VII SANCTIONS

Special Counsel is required to cooperate fully with the policies and procedures outlined by the Attorney General's Office, specifically the Collections Enforcement Section. Failure to perform any of the duties as outlined by this Retention Agreement and the Ohio Attorney General's Office's policies and procedures will result in the issuance of a notice in writing of non-compliance and may be subject to sanction, including but not limited to the following:

1. Submission of monthly reports to the Director of Special Counsel in the Collections Enforcement Section for review;

2. Attendance at required conferences with the Section Chief of the Collections

Enforcement Section and/or General Counsel;

3. Suspension of new assignments to Special Counsel; and/or

4. Termination of appointment and the return of all accounts assigned.

ARTICLE VIII SAFEGUARDING CONTRACT LANGUAGE

Section 1 Performance

In performance of this Agreement, Special Counsel, as a contractor of the Ohio Attorney General, agrees to comply with and assume responsibility for compliance by his/her employees with the following requirements:

(1) All work will be performed under the supervision of Special Counsel or Special Counsel's responsible employees.

(2) Any Federal tax returns or return information (hereafter referred to as returns or return information) made available shall be used only for the purpose of carrying out the provisions of this Agreement. Information contained in such material shall be treated as confidential and shall not be divulged or made known in any manner to any person except as may be necessary in the performance of this Agreement. Inspection by or disclosure to anyone other than the Special Counsel or employee of the Special Counsel is prohibited.

(3) All returns and return information will be accounted for upon receipt and properly stored before, during, and after processing. In addition, all

related output and products will be given the same level of protection as required for the source material.

(4) No work involving returns and return information furnished under this Agreement will be subcontracted without prior written approval of the Attorney General and the IRS.

(5) Special Counsel will maintain a list of employees authorized access. Such list will be provided to the Attorney General's Office and, upon request, to the IRS reviewing office.

(6) Incident response policy and procedures must be developed, documented, disseminated, and updated as necessary to facilitate the implementing incident response security controls.

(7) Audit and accountability policy and procedures must be developed, documented, disseminated, and updated as necessary to facilitate implementing audit and accountability security controls.

a. To support the audit of activities, all Special Counsel must ensure that audit information is archived for six years.
b. The information system must protect audit information and audit tools from unauthorized access, modification, and deletion.

(8) The Attorney General will have the right to void this Agreement if Special Counsel fails to provide the safeguards described above, or any other safeguard required under *Publication 1075: Tax Information Security Guidelines For Federal, State and Local Agencies*).

Section 2 Criminal/Civil Sanctions

(1) Each employee of Special Counsel to whom returns or return information is or may be disclosed

shall be notified in writing by Special Counsel that returns or return information disclosed to such Special Counsel or employee can be used only for the purpose and to the extent authorized herein, and that further disclosure of any such returns or return information for a purpose or to an extent unauthorized herein constitutes a felony punishable upon conviction by a fine of as much as $5,000 or imprisonment for as long as five years, or both, together with the costs of prosecution. Special Counsel shall also notify each such employee that any such unauthorized future disclosure of returns or return information may also result in an award of civil damages against the Special Counsel and employee in an amount not less than $1,000 with respect to each instance of unauthorized disclosure. These penalties are prescribed by IRC Sections 7213 and 7431and set forth at 26 CFR 301.6103(n)-1.

(2) Each employee of any Special Counsel to whom returns or return information is or may be disclosed shall be notified in writing by such Special Counsel that any return or return information made available in any format shall be used only for the purpose of carrying out the provisions of this Agreement. Information contained in such material shall be treated as confidential and shall not be divulged or made known in any manner to any person except as may be necessary in the performance of this Agreement. Inspection by or disclosure to anyone without an official need to know constitutes a criminal misdemeanor punishable upon conviction by a fine of as much as $1,000.00 or imprisonment for as long as 1 year, or both, together with the costs of prosecution. Special Counsel shall also notify each such employee that any such unauthorized

inspection or disclosure of returns or return information may also result in an award of civil damages against the employee in an amount equal to the sum of the greater of $1,000.00 for each act of unauthorized inspection or disclosure with respect to which such defendant is found liable or the sum of the actual damages sustained by the plaintiff as a result of such unauthorized inspection or disclosure plus in the case of a willful inspection or disclosure which is the result of gross negligence, punitive damages, plus the costs of the action. The penalties are prescribed by IRC Sections 7213A and 7431.

(3) Additionally, it is incumbent upon Special Counsel to inform his/her employees of the penalties for improper disclosure imposed by the Privacy Act of 1974, 5 U.S.C. 552a. Specifically, 5 U.S.C. 552a(i)(1), which is made applicable to Special Counsel as contractors of the Ohio Attorney General by 5 U.S.C. 552a(m)(1), provides that any officer or employee of a contractor, who by virtue of his/her employment or official position, has possession of or access to agency records which contain individually identifiable information, the disclosure of which is prohibited by the Privacy Act or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(4) Granting Special Counsel access to FTI must be preceded by certifying that each individual understands the agency's security policy and procedures for safeguarding IRS information. Special Counsel must maintain his/her authorization to

access FTI through annual recertification. The initial certification and recertification must be documented and placed in the Attorney General's files for review. As part of the certification and at least annually afterwards, Special Counsel and Special Counsel's employees should be advised of the provisions of IRC Sections 7431, 7213, and 7213A (see Exhibit 6, *IRC Sec. 7431 Civil Damages for Unauthorized Disclosure of Returns and Return Information and* Exhibit 5, *IRC Sec. 7213 Unauthorized Disclosure of Information*). The training provided before the initial certification and annually thereafter must also cover the incident response policy and procedure for reporting unauthorized disclosures and data breaches. (*See* Section 10 of *Publication 1075: Tax Information Security Guidelines For Federal, State and Local Agencies*) For both the initial certification and the annual certification, Special Counsel and Special Counsel's employees should sign, either with ink or electronic signature, a confidentiality statement certifying their understanding of the security requirements.

Section 3 Inspection

Special Counsel shall comply with the requirements of the IRS Publication 1075, including all requirements referencing or related to, record retention and audit requirements to safeguard FTI.

The IRS and the Attorney General's Office shall have the right to send its officers and employees into the offices and plants of Special Counsel for inspection of the facilities and operations provided for the performance of any work under this Agreement. This will include alternate worksites where FTI is received, processed, stored, destroyed,

or has been handled by any other means; this provision specifically includes private property held by the contractor if it allows its employees to establish an alternate work site within their property. On the basis of such inspection, specific measures may be required in cases where Special Counsel is found to be noncompliant with contract safeguards. On the basis of such inspection, specific measures may be required to remedy matters of non-compliance, in cases where the Special Counsel is found to be noncompliant with Retention Agreement safeguards or measures as defined by the IRS Office of Safeguards or the Attorney General's Office.

A background check must be performed, as required by IRS Publication 1075, on each of Special Counsel's employees or subcontractors that may be exposed to records provided by the Attorney General's Office. Results of the background checks shall be made available to the Attorney General, IRS or their designees upon request.

Special Counsel must provide staff, logs, records, systems access, and access to the facilities at its own expense to assist during each of the inspection/audits. Inspections/Audits may be performed by the Attorney General's Office, IRS or their designee at any time the Special Counsel is in possession of FTI or during the subsequent years until all FTI has been return or destroyed, the return or destruction have been reported to the Attorney General's Office, and the retention periods for these records as defined in IRS publication 1075 have expired.

The undersigned represent they are authorized to enter into this Retention Agreement

numbering eighteen (18) pages. The undersigned acknowledge they have read and understand all terms set forth herein. By affixing their signatures below, the parties evidence their intent to be bound hereto.

THE OHIO ATTORNEY GENERAL

_____

BY

_____

TITLE

_____

DATE

SPECIAL COUNSEL

_____

SIGNATURE OF APPOINTED ATTORNEY

_____

PRINTED NAME OF APPOINTED ATTORNEY

_____

DATE

_____

ADDRESS

_____

CITY/STATE/ZIP

****To be in compliance with the 45 day notice period under IRS's 1075 requirements and 26 USC 6103, certain tax accounts assigned prior to August 13, 2012, are considered to be part of the FY 12 retention

agreement which is extended for this limited purpose. Said extension for this limited purpose expires August 14, 2012.

Doc. 48-11 **EXHIBIT C6**

[Letterhead of
Law Office of Eric A. Jones, LLC]

May 2, 2012

Mike DeWine
Ohio Attorney General's Office
Collections Enforcement Section
150 E. Gay Street, 21st Floor
Columbus, Ohio 43215

RE: Eric A. Jones
Fiscal Year 2012 Request for Qualifications for Special Counsel
Fiscal Year 2013

Dear Mr. DeWine:

I am pleased to have the opportunity to be considered for Collections Special Counsel for the Ohio Attorney General and my response to the April 13, 2012 Request for Qualifications for Special Counsel for Fiscal Year 2013 (RFQ) is enclosed. I own and operate the Law Office of Eric A. Jones, LLC located in downtown Columbus, Ohio. I and my staff have in depth knowledge and extensive experience in all aspects of collection law including general collections, securing judgments and post-judgment enforcement for State Clients and private sector clients. I have a staff of five attorneys, all of whom work under my direct supervision and are experienced with all aspects of debt collection, that enable me to handle a high volume of accounts throughout the state of Ohio.

I have served as Collections Special Counsel since 2007. During this time, I have collected millions of dollars owed to the State of Ohio. I have the ability and am accustomed to electronically receiving and sending data to our clients via the Columbia Ultimate Business Solutions (C.U.B.S.) system and can generate collection activity and statistical reports according to your specifications. I also have a document tracking and imaging system in place to ensure that any information entrusted to me confidential and safeguarded. I am accustomed to working all accounts assigned to me promptly and will continue to do so.

My office has developed an effective and efficient process for collecting accounts that has proven to be successful. Upon receipt of new accounts, we promptly load all account data into our collections system, which is on a secure server dedicated to our collections operation. This data is refreshed on a daily basis to ensure we have the most current data from the Ohio Attorney General in conducting our work. We have the capability to send notices to debtors within twenty-four hours of receiving the accounts. In addition to mailing notices to debtors, we utilize IAT SmartDial Solutions to automate our phone calls for maximum efficiency. Finally, we have a group of well trained, experienced, and professional collectors who directly contact debtors by using the most effective skip tracing tools available.

I will uphold the integrity and reputation of the Ohio Attorney General's office. All of my staff and I adhere to a strict code of ethics and strictly follow the Fair Debt Collection Practices Act and other state and federal requirements. We regularly attend

continuing education seminars to stay current on all debt collection regulations. Our staff is trained to be professional, respectful and straight-forward allowing us to effectively work with debtors, which simplifies the debt recovery process with the maximum outcome.

I am committed to providing timely and effective client service to the Ohio Attorney General and I am very confident that I and my team are exceptionally qualified and we have all of the resources necessary to achieve excellent results for the State of Ohio. I affirm that all statements contained in the RFQ response and attachments are true and accurate. Thank you for your consideration. If you have any questions or require any additional information please call me directly at (614) 545-9998.

Respectfully yours,

/s/Eric A. Jones
Eric A. Jones, J.D., M.B.A.
Law Office of Eric A. Jones, LLC
580 S. High Street, Suite 100
Columbus, Ohio 43215
(614) 545-9998
Fax (614) 224-9300
ejones@ericjoneslaw.com

[Letterhead of Mike DeWine
Ohio Attorney General]

Ohio Attorney General's Office
Request for Qualifications for
Collections Special Counsel

Fiscal Year 2013

Date Issued: Friday, April 13, 2012

Deadline for Questions: 5:00 PM, Friday, April 20, 2012

Responses Due: 5:00 PM, Friday, May 4, 2012

Submit Responses Electronically to:
CollectionsCounsel@OhioAttorneyGeneral.gov

Direct Specific Questions regarding this RFQ to:
CollectionsCounsel@OhioAttorneyGeneral.gov

Submitted By:
Eric A. Jones, J.D., M.B.A.
Law Office of Eric A. Jones, LLC
580 S. High Street, Suite 100
Columbus, Ohio 43215
(614)545-9998
ejones@ericjoneslaw.com

Section 1: Overview & Scope of Services

Thank you for your interest in serving the Ohio Attorney General (the "Attorney General") and the State of Ohio as a Collection Special Counsel. The Attorney General serves as legal counsel and the collector of past due debt for Ohio's various state agencies, boards, departments, commissions, colleges, universities, political subdivisions and retirement systems (collectively, the "State Clients").

Counsel wishing to be considered for appointment as Collections Special Counsel for a term commencing July 1, 2012 through June 30, 2013 ("FY13") must be registered with the Attorney General through the completion and submission of a response to this Request for Qualifications ("RFQ").

The Attorney General seeks responses from attorneys interested in representing the Clients in the collection and litigation of outstanding state debts and obligations. Attorneys with an interest and expertise in all aspects of collection work are sought. In particular, the Attorney General seeks attorneys with experience in general collections, the securing of judgments, and post-judgment enforcement, along with those who have experience representing creditors in bankruptcy matters. The work will include general collection work and related litigation.

The Attorney General expects all counsel wishing to be considered for an appointment to have in-depth knowledge, experience and expertise in the practice areas for which a Collections Special Counsel appointment is sought. Please clearly communicate your and your firm's knowledge and expertise by emphasizing your experience, reputation and ability to perform the work requested.

Collections Special Counsel must have a document tracking system in place to ensure that information entrusted to you is not misused, and that confidential information is safeguarded. It is the expectation of the Attorney General that you will work all accounts assigned to you promptly, and obtain advance approval for any remedies that may shut down an Ohio business, foreclose on any commercial business, or result in a residential foreclosure.

Collections Special Counsel and staff must be familiar with the ethics statutes governing state employees and appointees, including those concerning employment of former government employees, gifts and lobbying. You must make sure that all financial obligations you or your employees have to the State of Ohio are promptly paid and resolved. You must maintain workers' compensation coverage on yourself and your employees.

Collections Special Counsel may, only with the express written consent of the Attorney General, delegate legal work to another attorney outside the firm with which the special counsel is affiliated. This is the only delegation of work permitted. Under no circumstances may Special Counsel subcontract, forward, assign, or otherwise delegate work assigned by the Attorney General to any other individual or entity. All work shall be conducted by employees of Special Counsel's law firm.

Collections Special Counsel must report their work on a regular basis, and must ensure that their notes and collection actions can be uploaded to the computer system utilized by the Attorney General. This includes the Columbia Ultimate Bookkeeping System ("CUBS") for FY13 but may also include

other collection systems used by the Attorney General or Clients currently or in the future.

Collections Special Counsel must promptly respond to inquiries from the Attorney General's office and the Clients. Collections Special Counsel must commit to fair debt collection practices, and must report matters that may be controversial, have media interest, involve elected officials, or otherwise could be considered sensitive or delicate to the Director of Special Counsel at Traci.Saliba@OhioAttorneyGeneral.gov.

Collections Special Counsel must be committed to providing timely and effective client service and must continue their education, and those of their staff, by completing relevant professional training as required by the Attorney General.

Collections Special Counsel must carefully screen matters assigned to you for potential conflicts of interest, and promptly report any potential problems to the Director of Special Counsel at Traci.Saliba@OhioAttorneyGeneral.gov. You must segregate state accounts and develop and maintain a system to assure the confidentiality of state accounts and client information, using such information only for the purpose of collecting state debt.

As Collections Special Counsel, you must relinquish accounts when requested to do so by the Attorney General.

Section 2: Retention Agreement

If you are selected as Collections Special Counsel, your relationship to the Attorney General will be defined by contract, and neither you nor your firm's staff will be considered to be employees of the

Attorney General or any Client. You will be considered an independent contractor subject to the rules, regulations and laws of the State of Ohio including, those governing fair debt collection, any applicable Federal laws, and the Rules of Professional Conduct governing attorneys.

The Retention Agreement to be awarded pursuant to this RFQ is **attached as Exhibit A**. If chosen, Special Counsel must be willing to sign and comply with all terms and conditions of the Retention Agreement. No variations or exceptions to the terms and conditions in the Retention Agreement will be accepted. The RFQ and Special Counsel's RFQ Response will be incorporated into the Retention Agreement. The Retention Agreement is provided for information purposes only. **Do not sign a copy of the Retention Agreement or submit with your RFQ response.**

A Retention Agreement awarded pursuant to this RFQ shall be subject to Ohio Revised Code Section 126.07. Accordingly, no rights, duties, or obligations under such a Retention Agreement shall be binding on the Attorney General until such time as all necessary funds are available or encumbered and, when required, such expenditures of funds is approved by the Controlling Board of the State of Ohio.

Collection work is principally compensated on a percentage basis, according to schedules that will become part of your contract with the Attorney General.

Section 3: RFQ Submission and Related Information

To be eligible for an appointment as Collections Special Counsel for FY13, you must complete a response to this RFQ (an "RFQ Response"), even if you are presently serving as Special Counsel under a fiscal year 2012 appointment. Completion of an RFQ Response does not automatically ensure that you will receive a FY13 Collections Special Counsel appointment.

Your FY13 RFQ Response, including all attachments, must be sent via email to: CollectionsCounsel@OhioAttorneyGeneral.gov no later than 5:00 PM on Friday, May 4, 2012 (the "Deadline").

Responses received in hard copy or by facsimile or received after the Deadline may be considered nonresponsive.

Please direct any specific questions regarding this RFQ to: CollectionsCounsel@OhioAttorneyGeneral.gov Questions must be submitted by Friday, April 20, 2012 at 5:00 PM. All questions and responses will be posted. Responses to all questions received will be posted on the Attorney General's website (www.OhioAttorneyGeneral.gov/CollectionsForms.) on April 24, 2012. An additional 24-hour period will be opened to allow an opportunity to submit Requests for Clarification of the posted responses. Requests for Clarification must be submitted to CollectionsCounsel@OhioAttorneyGeneral.gov and will only be accepted until 5:00 PM on April 25, 2012. No new questions will be entertained during this period. Responses to Requests for Clarification will

be posted on April 26, 2012. No new responses will be posted after April 26, 2012.

By submitting your RFQ Response, you agree that the Attorney General may copy any documents and information that you may provide for purposes of facilitating its evaluation or to respond to requests for public records. Further, you consent to such copying and warrant and represent that such copying will not violate the rights of any third party. The Attorney General will have the right to use any ideas or adaptations of ideas that are represented in the responses. All responses become the property of the Attorney General and will not be returned to you. All information and materials that you submit may be treated as a public record pursuant to Ohio Revised Code Section 149.43.

The Attorney General reserves the right to amend this RFQ at any time. Notice of amendments will be posted to the Attorney General's website. The Attorney General reserves the right to waive or permit cure of nonmaterial variances in an RFQ response; however, any such waiver will be based on the Attorney General's or any Client's best interest as determined by the Attorney General.

The Attorney General reserves the right to reject any or all RFQ Responses in its discretion in whole or in part, to advertise for new responses, to abandon the need for such services, and to cancel this RFQ if it is deemed to be in the best interest of the Attorney General or any Client.

Nothing in this RFQ or any communication between the Attorney General and any respondent shall be deemed to grant any respondent a right to appointment as Collections Special Counsel.

Appointment as Collections Special Counsel and compensation shall only become effective upon execution of a Retention Agreement, and appointment in accordance with Ohio Revised Code Section 109.07 and the established procedures of the Attorney General.

This RFQ is to be construed in light of pertinent legal requirements of the State of Ohio. Changes in applicable laws and rules may affect the selection process or the resulting Retention Agreement. It is your responsibility to ascertain pertinent legal requirements and restrictions.

By submitting an RFQ Response, you agree that you will not bring any claim or seek any cause of action against the Attorney General or the State of Ohio based on any misunderstanding concerning the information provided in this RFQ or any response, or lack thereof, to an inquiry relating to this RFQ and the selection process.

The Attorney General will not reimburse any expenses incurred by you in submitting this RFQ, including any expenses associated with an interview at the Attorney General's offices in Columbus, Ohio, should the Attorney General determine that such an interview is necessary in evaluating your qualifications.

Nothing in this RFQ is intended to limit or constrain the discretion of the Attorney General in exercising any of his authority, duties, prerogatives, or powers established or recognized in the Constitution, statutes, Executive Orders, regulations, case law, common law, or contract. The Attorney General may hire special counsel outside of this RFQ process if

deemed appropriate, in his sole discretion, for the benefit of the State and the Clients.

Section 4: Required Components for Your RFQ Response

All documentation must be provided electronically, with your RFQ response to: CollectionsCounsel@OhioAttorneyGeneral.gov

Responses received in hard copy or by facsimile will be considered non-responsive.

- Your RFQ Response should be prepared simply and economically providing a direct, concise delineation of your experience and qualifications. Your response must meet the criteria set forth in all sections of this RFQ.
- Responses must be no smaller than 12 point font and are limited to 35 pages. Please note required documentation does not count towards the page limit restriction.
- All pages of the response must have consecutive page numbers.
- Responses must be submitted in PDF format. (Please note that the OH SPR must be submitted in Word format.)
- Applicants must restate the section numbers and the text of the requirement in the same sequence as this RFQ.
- Responses should be provided immediately after the restated requirement.
- Should you also submit an OH SPR, the OH SPR and its attachments are not subject to the above submission requirements.

Submission guidelines for the OH SPR are located on the first page of the OH SPR. Where there is an overlap of information requested in the RFQ and the OH SPR, you must provide the information in both places.

A. Required Documentation (available on our web site at:
www.OhioAttorneyGeneral.gov/CollectionsForms.

- o Cover Letter – Not to exceed two pages. Shall affirm that all statements are true and accurate. Should clearly communicate your knowledge, experience and ability to perform the work requested. Shall include the signer's mailing address, telephone number, fax number and e-mail address.
- o Affidavit of Eligibility (Attachment 1)
- o Declaration of Material Assistance (Attachment 2)
- o Vendor ID & W-9 forms (Attachment 3)
- o Firm Demographics Form (Attachment 4)
- o Current Bureau of Workers' Compensation certificate (Attachment 5)
- o Affirmative Action Plan Verification Form with the Ohio Department of Administrative Services (Attachment 6)

B. Certifications Required

You must provide the following certifications to be considered for appointment as a Collections Special Counsel.

1. A copy of your current professional liability insurance demonstrating coverage by a company authorized to do business in Ohio with a Best rating of at least "A" (Include as an attachment to your response).

RESPONSE:

A true and accurate copy of our current professional liability insurance is attached as Attachment 7. (*Please note that I have included a copy of the policy renewed May 12, 2012 and a copy of the current policy that expires May 12, 2012.*)

2. Ethics and Malpractice Certification that:

   a. No ethics complaints have been filed against you or your law firm within the last five (5) years that did not result in dismissal.

   RESPONSE:

   I hereby certify that no ethics complaints have ever been filed against me or my law firm.

   b. No legal malpractice actions are pending or have been adversely decided against you or your law firm within the last five (5) years.

   RESPONSE:

   I hereby certify that no malpractice actions are pending or have ever been adversely decided against me or my law firm.

If such complaints or actions have occurred, please provide an explanation of facts and outcome.

No response required.

3. Certification that each attorney in your firm who would be involved with claims and cases assigned to you as Collections Special Counsel is a member in good standing of the Ohio bar, federal bar and/or state bar in which he or she has been admitted to the

practice of law (please identify other states), and has not been disqualified to practice law in any jurisdiction or forum.

RESPONSE:

I hereby certify that I and each attorney associated with the Law Office of Eric A. Jones, LLC is a member in good standing of the Ohio bar, federal bar and/or state bar in which he or she has been admitted to the practice of law, and has not been disqualified to practice law in any jurisdiction or forum.

True and accurate Certifications from the Supreme Court of Ohio and the West Virginia State Bar are attached as Attachment 8.

4. Certification that each attorney in your firm who would be involved with claims and cases assigned to you as Collections Special Counsel is not subject to an "unresolved" finding for recovery under R.C. 9.24. If the warranty is deemed to be false, the Retention Agreement will be deemed void ab initio, and Special Counsel may be required to repay to the State of Ohio any funds paid under the Retention Agreement.

RESPONSE:

I hereby certify that each attorney associated with the Law Office of Eric A. Jones, LLC is not subject to an "unresolved" finding for recovery under R.C. 9.24.

C. Disclosure of Conflict of Interest and other Collection Matters

1. A list and explanation of any claims and lawsuits brought against any member of your firm, including any attorney or employee, alleging a violation of the Fair Debt Collection Practices Act within the last five (5) years.

RESPONSE:

Chris J. Tolbert v. Law office of Eric A. Jones, LLC
Case No. 2009 CVI 026100
Status – Judgment in Favor of Defendant

A claim was filed in Franklin County Municipal Small Claims Court on June 15, 2009, alleging a violation of the Fair Debt Collection Practices Act. The basis of the allegation was that Mr. Tolbert claimed he received a letter from the Law Office of Eric A. Jones, LLC regarding an outstanding debt subsequent to him requesting verification of the debt. Judgment was entered in favor of Eric A. Jones finding that there were absolutely no violations of the Fair Debt Collection Practices Act and the claims was wholly without merit.

Elay Lewis, Sr. v. Law Office of Eric A. Jones, LLC
Case No. 2011CVI01497
Status – Dismissed with Prejudice

A claim was filed in the Montgomery County Municipal Small Claims Court on December 28, 2011, alleging violations of

the Fair Debt Collection Practices Act. The basis of the allegations was that Mr. Lewis claimed he received letters and phone calls from the Law Office of Eric A. Jones, LLC regarding an outstanding debt that wasn't his. Mr. Lewis had been making payments on the debt and had previously agreed that it was his legal obligation. The court dismissed Mr. Lewis' complaint with prejudice.

2. A list and description of the systems you have in place to screen incoming accounts and claims to assure that your firm and the particular counsel who has accepted an appointment on a state collection matter does not have a conflict of interest, including representation of a private client in a matter against or competing with that of the State of Ohio.

RESPONSE:

The Law Office of Eric A. Jones, LLC takes conflict of interest very seriously. We maintain all collection matters on the Columbia Ultimate Business Solutions (C.U.B.S.) system. To screen for potential conflicts, we run a "matching report" upon each loading of new accounts into the C.U.B.S. system. The matching report algorithm searches names, SSNs, phone numbers, addresses, and clients existing in the system and identifies any newly input accounts that match existing ones. Newly input accounts that are identified as matching existing accounts are consolidated

on a matching report. The matching report is then examined to determine if any potential conflicts exist. Non-collection clients are maintained on a separate system but such clients are input into the C.U.B.S. system at least monthly to be included in the matching reports.

It is our policy to decline to represent any clients in matters against or directly competing with that of the State of Ohio. Eric A. Jones reviews all new matters to ensure that no actual or reasonably foreseeable conflicts exist with the State of Ohio prior to engaging in the representation of new clients.

It is our policy that all staff members are required to immediately report in writing any potential conflicts of interest that may be identified. Should an actual or potential conflict of interest by discovered, Eric A. Jones will notify the Deputy Director of Special Counsel that we will not be able to represent the Ohio Attorney General in particular matter(s) until any and all conflicts have been resolved.

Additionally, Eric A. Jones visually screens all incoming accounts assigned by the Attorney General on a weekly basis, via the Compass Consulting Group System to identify any accounts assigned for potential conflicts. As a final added measure, a complete listing of the firm's non-State Clients is provided to the firm's Director of Collections on at least a monthly basis to

perform conflicts checks with all accounts assigned by the Attorney General.

3. List and describe those matters where your past or present clients have an interest adverse to or competing with that of the State of Ohio.

RESPONSE:

There are no known past or present clients that have an interest adverse to or competing with that of the State of Ohio.

4. List and describe, including case caption, case number and court of those matters where you have, within the last five (5) years brought an action against or represented any State Client in a collection matter or bankruptcy proceeding. Describe the scope of that representation, the client involved and whether the representations are closed or current.

RESPONSE:

Neither I nor any members my firm has brought an action against any State Client.

However, we have represented dozens of State Clients in thousands of collection matters over the past five years including the Department of Taxation, Bureau of Workers' Compensation, Ohio Department of Job and Family Services and The Ohio State University Medical Center. The complete list of accounts is too numerous to provide within the page restrictions of this RFQ response. Below is a sample listing of

such cases in which we have represented State Clients:

- State of Ohio Dept. of Tax. V Hartke Enterprises, Inc., 10 SCJ 49137, Montgomery County Common Pleas Court.
- State of Ohio Dept. of Tax. V C L Smith Machinery Services Inc., 10 JG 08 33091, Franklin County Common Pleas Court.
- State of Ohio Dept. of Tax. V Mark Crouse, 09 CJ 0181, Clark County Common Pleas Court
- State of Ohio Dept. of Tax. v. Timothy Dirr, CJ08008327, Hamilton County Common Pleas Court
- State of Ohio Dept. of Tax. V Copley's Paving, LLC, 2008 JD 11208, Licking County Common Pleas Court.
- State of Ohio Dept. of Tax. V James R. Gerhart, 08 ST 21 211, Delaware County Court of Common Pleas.
- ODJFS v. Bellefontaine Masonry, CV 10 11 0563, Logan County Common Pleas Court.
- State of Ohio Dept. of Tax. V Sandra Dupuy Marshall, 09TA000066, Scioto County Common Pleas Court.
- ODJFS v. Columbus W.C., Inc. v. Saila & Sunnia, Inc., 10 CVH-12-17725, Franklin County Common Pleas Court
- State of Ohio Dept. of Tax. V Regina & Lawrence Selby, 2008CJ0732, Pickaway County Common Pleas Court

D. Disclosure of Known Conflicts of Interest: Non-Collection Matters

1. Outside of collection or bankruptcy matters, have you brought or currently have a claim or cause of action against the State of Ohio or any State Client? Provide a list of all such matters, including the case caption, case number and court, the scope of the representation and the name of your client and the name of the State Client with whom your client is adverse. Please designate in your response which representations are closed and which are current.

RESPONSE:

Neither Eric A. Jones nor the Law Office of Eric A. Jones, LLC has brought a claim or cause of action against the State of Ohio or any State Client.

2. List all employees and attorneys of your firm that have previously been employed by the Attorney General or a State Client at any time, including the name of the State Client, the duration of employment and position.

RESPONSE:

I was employed by the Ohio Department of Job and Family Services as Assistant Chief of the Bureau of Managed Health Care from April 2006 to July 2007 and as Contract Administrator II from August 2005 to April 2006.

Tracy Hale was employed by the Ohio Attorney General Revenue Recovery Section

as Account Representative II, Team Leader from February 2003 to June 2005.

3. List all employees and attorneys of your firm who are indebted to the State of Ohio and the case number, account numbers and State Client to whom the financial obligation is owed, and whether the account is in good standing, or certified as a past due debt to the Attorney General, other than current tax liabilities.

RESPONSE:

None of the employees or attorneys is indebted to the State of Ohio.

E. Continuing Legal Education

List and describe those Continuing Legal Education ("CLE") seminars you and members of your firm have attended dealing with collection or bankruptcy law topics, including fair debt collection, within the last twenty-four (24) months. State the title, location, date and number of CLE credits awarded for the seminar and who attended.

RESPONSE:

Eric A. Jones attended Collections: Seeking & Collecting Judgments, December 21, 2010, located at Holiday Inn Worthington, (6 hours); Elder Law Institute Highlights, July 14, 2010, located at the Columbus Bar Association (6 hours), Current Issues in Collection Litigation (3 hours) on May 20, 2011 in Columbus, Ohio; on July 29, 2011, attended the Special Counsel Collection Seminar (4.25 hours) in Columbus, Ohio;

FDCPA and Legal Ethics Issues for Collection Attorneys, hosted by the Ohio Creditor's Attorney Association on April 27, 2012 in Columbus, Ohio (6 hours).

Robert A. Flaugher attended Current Issues in Collection Litigation (3 hours) on May 20, 2011 in Columbus, Ohio; on July 29, 2011, Mr. Flaugher attended the Special Counsel Collection Seminar (4.25 hours) in Columbus, Ohio; FDCPA and Legal Ethics Issues for collection Attorneys, hosted by the Ohio Creditor's Attorney Association on April 27, 2012 in Columbus, Ohio (6 hours).

Dustin Garris attended FDCPA and Legal Ethics Issues for Collection Attorneys, hosted by the Ohio Creditor's Attorney Association on April 27, 2012 in Columbus, Ohio (6 hours).

Section 5: Practice Areas

Please check each practice in which you are both qualified to practice and interested in representing State Clients:

_ **Bankruptcy Collection Matters** (If applying for Bankruptcy Counsel list the bankruptcy courts where you have been admitted to practice and the courts in which you have actively and continuously represented clients .)

x **General State Collections** (If you are seeking appointment to handle personal income tax or unemployment compensation fraud accounts, you must complete an Ohio SPR, available at

www.OhioAttorneyGeneral.gov/CollectionsForms , and be able to demonstrate compliance with *Publication 1075: Tax information Security Guidelines for Federal, State and Local Agencies.* A copy of this publication is available at IRS.gov.)

RESPONSE:

I have submitted an Ohio SPR concomitantly with the RFQ response.

x **Medicaid Estate Recovery**

x **Subrogation Collections**

x **University Collections** (If you are seeking appointment to handle claims or matters involving university debt, please explain the protections your office has in place to assure compliance with FERPA privacy practices.)

RESPONSE:

The Law Office of Eric A. Jones, LLC fully complies with the FERPA of 1974, as amended, (FERPA) and we have taken the necessary measures to protect the privacy of student educational records. FERPA considers collection activities a legitimate educational interest and universities may release information to Special Counsel without consent. Once student information is received by our office it is handled as it if were FTI pursuant to the responses contained in the Ohio SPR, which meets or exceeds the privacy standards under FERPA.

_ **University Medical Center Collections** (If you are seeking appointment to handle claims or matters involving medical bills, workers' compensation, crime victims compensation, or other matters involving HIPAA, please explain the protections your office has in place to assure compliance with HIPAA privacy practices.)

x **Local Debt** (If you are seeking appointment to handle local debt and you are currently under contract to collect for any local government agency, board, commission or political subdivision, you may not receive assignments of local debt.)

RESPONSE:

Neither I nor members of my firm are currently under contract to collect for any local government agency, board, commission or political subdivision.

Section 6: Experience and Resources

1. Describe your and your firm's past representation as special or outside counsel for the State of Ohio, including any State Clients represented.

RESPONSE:

Eric A. Jones has served as Special Counsel to the Ohio Attorney General since 2007. He has had approximately 40,000 collection accounts assigned to him by the Ohio Attorney General. Eric A. Jones has represented numerous state clients in

collection matters including but not limited to:

a. Ohio Lottery Commission
b. Department of Mental Health
c. Department of Taxation
d. Department of Transportation
e. Department of Natural Resources
f. The Ohio State University Medical Center
g. Ohio Public Employees Retirement System
h. Shawnee State University
i. Ohio University
j. Belmont Community College
k. Zane State College
l. Public Utilities Commission of Ohio
m. Police and Fireman Disability and Pension Fund
n. Ohio Youth Commission
o. Department Rehabilitation and Correction
p. State Teachers' Retirement System
q. Bureau of Workers' Compensation
r. Department of Vocational Rehabilitation
s. Ohio Department of Job and Family Services

2. Summarize the knowledge, expertise and experience you have in matters of state government collection, including particular State Clients and areas of practice.

RESPONSE:

I have served as Special Counsel to the Ohio Attorney General collecting debt owed to the State of Ohio since 2007 During this

time, I have represented State Clients in thousands of collection matters collecting millions of dollars. I have full knowledge of and comply with the Fair Debt Collection Practices Act in every respect. Additionally, the firm has an exceptional team of collectors, each with at least 12 years of collections experience, most of which is with Special Counsel and/or Third Party Vendors. The Director of Collections has in excess of 30 years of collections experience. Please see Section 6:1 for a sample listing of the particular State Clients I have represented.

Attorney Robert A. Flaugher has more than seventeen years of experience in collecting for consumer and commercial lenders throughout Ohio and West Virginia. Four of these years was spent working for Special Counsel.

a. Do you have any collection experience with non-state clients?

RESPONSE:

In addition to having served Collections Special Counsel to the Ohio Attorney General since 2007, I have also represented numerous non-state clients in multiple industries including law firms, healthcare providers, builders and contractors, landlords and service organizations. I have full knowledge of and comply with the Fair Debt Collection Practices Act in every respect.

b. Will the State of Ohio be your sole client?

RESPONSE:

The Law Office of Eric A. Jones, LLC also has experience collecting for multiple non-state clients and intends to continue such representation. It is anticipated that non-state clients account for less than 5% of the Firm's total collection accounts.

3. If your firm has previously collected for any other local government agencies, boards, commissions or political subdivisions, provide a list of your clients during the previous five (5) year period.

RESPONSE:

The Firm has not previously collected for any other local government agencies, boards, commissions or political subdivisions.

4. If applying for Bankruptcy Counsel list the bankruptcy courts where you have been admitted to practice, and the bankruptcy courts in which you have actively and continuously represented clients. Please describe the clients you currently represent in bankruptcy (i.e. creditors, debtors, etc...).

RESPONSE:

We have represented numerous creditors in all federal bankruptcy courts in Ohio and West Virginia. We do not represent debtors in bankruptcy matters.

5. Provide the number of collection matters your firm currently handles on an annual basis; differentiate between State Clients and other clients.

RESPONSE:

The Law Office of Eric A. Jones, LLC handles 45,000 collection accounts on an annual basis; approximately 42,000 State Client packeted accounts and 3,000 accounts for other clients.

6. List and describe how you will ensure that the Attorney General and the State Clients have representation and counsel if the primary attorney on a given matter is temporarily unavailable.

RESPONSE:

In the event that I am not available to provide requested legal services, Robert A. Flaugher, Esq., Brett Schmied, Esq., Dustin Garris, Esq., and Sonia Walker, Esq. are employed by the firm and designated to provide such services. The Law Office of Eric A. Jones, LLC also has relationships with attorneys in other states to provide assistance with matters that are outside of Ohio.

7. For each attorney expected to work under this assignment, please provide the following information:

a. A detailed description of each attorney's collection and bankruptcy experience.

RESPONSE:

- Eric A. Jones has served as Special Counsel to the Ohio Attorney General since 2007 and has collected millions of dollars and handled thousands collection matters including general collections, obtaining judgments and post judgment enforcement in the majority of counties in Ohio.
- Robert Flaugher has over seventeen years of collection law experience and has handled numerous collection matters including general collections, obtaining judgments and post judgment enforcement in nearly every county in Ohio and West Virginia. Mr. Flaugher also has extensive experience representing multiple creditors in bankruptcy proceedings in Ohio and West Virginia.
- Sonia Walker has over seven years of collection law experience and has handled numerous collection matters including general collections, obtaining judgments and post judgment enforcement,
- Brett Schmied has over two years of collection law experience and has handled numerous collection matters including general collections, obtaining judgments and post judgment enforcement.

- Dustin Garris has over one year of collection law experience and has handled numerous collection matters including general collections, obtaining judgments and post judgment enforcement.

b. Years of collection law experience.

RESPONSE:

- Eric A. Jones has nearly five years of collection law experience
- Robert Flaugher has over seventeen years of collection law experience.
- Sonia Walker has over seven years of collection law experience.
- Brett Schmied has over two year of collection law experience.
- Dustin Garris has over one year of collection law experience.

c. Percent of practice related to collection law matters.

RESPONSE:

- Ninety percent (90%) of Eric A. Jones' practice is related to collection law matters.
- Eighty-five percent (85%) of Robert Flaugher's practice is related to collection law matters.
- Twenty percent (20%) of Sonia Walker's practice is related to collection law matters.

- Forty percent (40%) of Brett Schmied's practice is related to collection law matters.
- Eighty (80%) of Dustin Garris' practice is related to collection law matters.

d. Percent of practice in state court and percent of practice in federal court.

RESPONSE:

Ninety-five percent (95%) of the firm's and its attorneys' collection law practice is in state court and five percent (5%) is in federal court.

e. Attorney registration number, the names of each state and federal bar to which he or she is admitted to practice; and the courts before which he or she is actively practicing.

RESPONSE:

- Eric A. Jones (0081670), admitted to practice law in Ohio 2007, actively practicing in all 88 Ohio counties.
- Robert Flaugher, admitted to the Ohio Bar (0066405) in 1996 and the West Virginia State Bar (7537) in 1997, admitted before all federal and state courts in both Ohio and West Virginia.
- Sonia Walker (0070422), admitted to practice in Ohio 1998, actively practicing in all 88 Ohio counties, admitted to United States District Court, Southern District 2001.

- Dustin R. Garris (00862921), admitted to practice in Ohio 2010, actively practicing in all 88 Ohio counties, admitted to United States District Court, Southern District 2011.
- Brett E. Schmied (0085076), admitted to practice in Ohio 2010, actively practicing in all 88 Ohio counties.

8. List and describe your collections computer system, including any software, cloud based computing, Integrated Voice Response, virtual environment, and/or VoIP systems utilized to collect debt. Any system that holds, processes, receives, sends, or otherwise touches tax information must be IRS Publication 1075 compliant.

RESPONSE:

The Law Office of Eric A. Jones, LLC maintains all collection accounts in the C.U.B.S. system, which provides detailed reporting capabilities for all accounts for the purpose of screening for conflicts. The Firm also utilizes the IAT SmartDial Solutions auto-dialing system to automate outgoing calls. The phone lines are direct inward dial to each collector enabling multi-line functions with voice mail. Our voice campaigns and dialer scripts are FDCPA compliant.

9. Describe how your existing systems provide the following:

a. Ability to screen incoming accounts for potential conflicts with the Attorney General and any State Client.

RESPONSE:

The Law Office of Eric A. Jones, LLC maintains all collection matters on the Columbia Ultimate Business Solutions (C.U.B.S.) system. We run a "matching report" upon loading new accounts into the C.U.B.S. system. The matching report algorithm searches the names, SSNs, phone numbers, addresses, and clients of existing data in the system and identifies any newly input accounts that match existing ones. The matching report is then examined to determine if any potential conflicts exist. Non-collection clients are maintained on a separate system but such clients are input into the C.U.B.S. system at least monthly to be included in the matching reports.

b. Ability to segregate state accounts from the other business of the firm.

RESPONSE:

The Law Office of Eric A. Jones, LLC segregates all collection accounts on the C.U.B.S. system, non-collection accounts are maintained on the Prevail system. **[REDACTED]**

c. Ability to document collection efforts.

RESPONSE:

The Law Office of Eric A. Jones, LLC documents all collections efforts including

summaries of telephone communications, communication attempts, payments received and actions taken regarding each account in real time on the C.U.B.S. system. Our C.U.B.S. system undergoes as daily refresh with the Ohio Attorney General's system to facilitate prompt communication to State Clients.

d. Ability to image documents.

RESPONSE:

The Law Office of Eric A. Jones, LLC has six document imaging devices on site; however we primarily use a Cannon iR 5000 PLL 5 E copy station for imaging purposes. All client media and received debtor correspondence are imaged to each debtor account. Images of payments, correspondence and client media are time stamped on the account when they are processed. Documents are imaged to the System using a Cannon iR 5000 PLL 5 E imaging system.

e. Your phone systems, including auto-dialer, call recording and monitoring capabilities.

RESPONSE:

The Law Office of Eric A. Jones, LLC's telephone system is the Mitel 5000 Communications Platform system. This system provides a compact flash card which is used for storage of voice mail, auto attendant, greetings and database information. This system enables the Firm to monitor and/or record daily call activity.

It also provides a call history log per extension and real time call monitoring by supervisors and for training purposes. The Firm utilizes the IAT SmartDialSolutions auto-dialing system to automate outgoing calls. The phone lines are direct inward dial to each collector enabling multi-line functions with voice mail. Our campaigns and dialer scripts are FDCPA compliant. Additionally, collection calls are routinely monitored and/or recorded to ensure staff compliance with the FDCPA. We offer a nationwide toll free number for long distance consumers.

f. Ability to generate, track and retain records documenting collection activities, and share these transactions electronically with the Attorney General.

RESPONSE:

The Law Office of Eric A. Jones, LLC has the ability to generate, track, and retain records documenting collection activities and share these activities with the Attorney General via the C.U.B.S. system. The C.U.B.S. system is designed to allow collectors efficient means for retrieving and documenting information for each collection claim and is refreshed daily with the Ohio Attorney General's system.

g. Other systems utilized in collection of debt.

RESPONSE:

We do not use any other systems utilized in the collection of debt not otherwise mentioned herein.

h. Legal researching systems.

RESPONSE:

We have an internal law library and we utilize computerized legal research systems including Lexis-Nexis, Westlaw, and Casemaker.

i. Existing interfaces to update the Attorney General's Collections System.

RESPONSE:

We currently interface and conduct a daily refresh to electronically share transactions with the Attorney General's information management systems including C.U.B.S., Client View and Compass Computer Solutions. Our staff has extensive experience interfacing with the Attorney General with other private entities and can be modified to accommodate any specific needs that may arise.

j. Legal researching systems, such as Casemaker, Lexis/Nexis, Westlaw or other researching system.

RESPONSE:

The Law Office of Eric A. Jones, LLC has access to Lexis-Nexis and Westlaw, and Casemaker is also utilized for legal research.

k. List your skip tracing tools.

RESPONSE:

We utilize Accurint, Lexis Nexis, Westlaw, and TLO for skip tracing services. We also use creative skip tracing methods utilizing various internet and other publicly available sources.

10. Provide a list of particular counties of the state in which you wish to work.

RESPONSE:

I am requesting to work in all Ohio counties. I have adequate internal processes, systems and staff to cover the entire state and presently do so.

11. Disaster Recovery Plan Please attach a copy of your data disaster recovery plan. Your plan should describe how you maintain security for you data and list any vendors who may have access to your data.

[REDACTED]

Section 7: Curriculum Vitae

Please attach the curriculum vitae of each attorney or paralegal in your firm who would be involved with work assigned as Collections Special Counsel. Provide the following information:

RESPONSE:

A curriculum vitae of each attorney or paralegal in the firm who would be involved with work assigned as Collections Special Counsel is attached as Attachment 10.

1. Identify whether you or any of your partners or associates is an elected official or member of any board or commission at the state or local level. Describe the position(s) with specificity.

RESPONSE:

There are no partners or associates in the firm that serve as an elected official or member of any board or commission at the state or local level.

2. For each person that will be assisting with collection work, please include: attorney registration number; the names of each state and federal bar to which he or she is admitted to practice; the courts before which he or she is actively practicing; bar association memberships; bar committee memberships and title or position in each, if any; professional and civic organizations; and any special awards or honors received.

RESPONSE:

- Eric A. Jones (0081670), admitted to practice law in Ohio 2007, actively practicing in all 88 Ohio counties, member of the Ohio State Bar Association and Columbus Bar Association, member of the Columbus Bar Association Health Care law Committee, member of Columbus Bar Association Small/Solo Law Firm Committee, member of Columbus Bar Association Social Security Disability Committee, serve on Board of Directors

and as First Vice President of the Disability Network of Ohio-Solidarity Foundation, Community Board Member of the Center of Science and Industry (COSI).

- Robert Flaugher, admitted to the Ohio Bar (0066405) in 1996 and the West Virginia State Bar (7537) in 1997, member of the Ohio and Columbus Bar Associations and West Virginia Bar Association, admitted before all federal and state courts in both Ohio and West Virginia. Mr. Flaugher is also a trained mediator and mediates civil matters in Ohio and West Virginia.
- Sonia Walker (0070422), admitted to practice in Ohio 1998, actively practicing in all 88 Ohio counties, admitted to United States District Court, Southern District 2001, member of the Ohio State Bar Association and Columbus Bar Association and member of Columbus Bar Association Social Security Disability Committee.
- Dustin R. Garris (0086291), admitted to practice in Ohio 2010, actively practicing in all 88 Ohio counties, member of the Ohio State Bar Association and Columbus Bar Association, member of the Columbus Bar Association Health Care Law Committee, and member of Columbus Bar Association Social Security Disability Committee.

- Brett E. Schmied (0085076), admitted to practice in Ohio 2010, actively practicing in all 88 Ohio counties, member of the Ohio State Bar Association and Columbus Bar Association, member of the Columbus Bar Association Health Care Law Committee, and member of Columbus Bar Association Social Security Disability Committee.

ATTACHMENT 1

[Letterhead of Mike DeWine
Ohio Attorney General]

AFFIDAVIT OF ELIGIBILITY
FOR SPECIAL COUNSEL APPOINTMENT

STATE OF OHIO:

COUNTY OF FRANKLIN: SS.

The undersigned, being first duly sworn, deposes and says as follows:

1. I am under consideration for an appointment as outside counsel by Ohio Attorney General Mike DeWine, and make this affidavit to certify my eligibility for such an appointment.
2. I hereby certify that neither I nor my law firm is disqualified under Ohio Revised Code § 3517.13 from being awarded a contract by Attorney General Mike DeWine.
3. I certify that neither I nor any of my partners, or officers, directors, or shareholders of my firm nor the spouses of any such person have

made contributions in excess of the limitations specified in R.C. § 3517.13.

4. I recognize that, pursuant to R.C. § 3517.992(R), whoever violates division (I) or (J) of R.C. § 3517.13 shall be fined up to one thousand dollars, and that any contract awarded to me in violation of either of those divisions may be rescinded.

/s/Eric A. Jones
SIGNATURE

LAW OFFICE OF ERIC A. JONES, LLC
FIRM NAME

ERIC A. JONES
PRINTED NAME

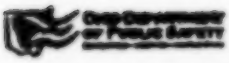
Sworn to before me, and subscribed in my presence this 30th day of April, 2012.

/s/ Trinity L. Vaughn
Notary Public, State of Ohio

[notary seal]

ATTACHMENT 2

DECLARATION OF MATERIAL ASSISTANCE ("DMA")



OHIO DEPARTMENT OF PUBLIC SAFETY

OHIO HOMELAND SECURITY
[illegible]

GOVERNMENT BUSINESS AND FUNDING CONTRACTS

In accordance with section [illegible] of the Ohio Revised Code

DECLARATION REGARDING MATERIAL ASSISTANCE/NONASSISTANCE TO A TERRORIST ORGANIZATION

This form serves as a declaration by an applicant for a government contract or funding of material assistance/nonassistance to an organization on the U.S. Department of State Terrorist Exclusion List ("TEL"). Please see the Ohio Homeland Security Division Web site for a copy of the TEL.

Any answer of "yes" to any question, or the failure to answer "no" to any question on this declaration shall serve as a disclosure that material assistance to an organization identified on the U.S. Department of State Terrorist Exclusion List has been provided. Failure to disclose the provision of material assistance to such an organization or knowingly making false statements regarding material assistance to such an organization is a felony of the fifth degree.

For the purposes of this declaration, "material support or resources" means currency, payment instruments, other financial securities, funds, transfer of funds, and financial services that are in excess of one hundred dollars, as well as communications, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.

[illegible] Law Office of Eric A. Jones, LLC			PHONE (614) [illegible]
[illegible] [illegible] S High St., # [illegible]			
CITY Columbus	STATE OH	ZIP 43215	COUNTY Franklin
[illegible] Eric A. Jones			TITLE Owner/Attorney

DECLARATION

In accordance with section [illegible] of the Ohio Revised Code
For each question, indicate either "yes," or "no" in the space provided. Responses must be truthful to the best of your knowledge.

1. Are you a member of an organization on the U.S. Department of State Terrorist Exclusion List? ☐ Yes ☒ No
2. Have you used any position of prominence you have with any country to persuade others to support an organization on the U.S. Department of State Terrorist Exclusion List? ☐ Yes ☒ No
3. Have you knowingly solicited funds or other things of value for an organization on the U.S. Department of State Terrorist Exclusion List? ☐ Yes ☒ No
4. Have you solicited any individual for membership in an organization on the U.S. Department of State Terrorist Exclusion List? ☐ Yes ☒ No
5. Have you committed an act that you know, or reasonably should have known, affords "material support or resources" to an organization on the U.S. Department of State Terrorist Exclusion List? ☐ Yes ☒ No
6. Have you hired or compensated a person you know to be a member of an organization on the U.S. Department of State Terrorist Exclusion List, or a person you know to be engaged in planning, assisting, or carrying out an act of terrorism? ☐ Yes ☒ No

If an applicant is prohibited from receiving a government contract or funding due to a positive indication on this form, the applicant may request the Ohio Department of Public Safety to review the prohibition. Please see the Ohio Homeland Security Web site for information on how to file a request for review.

CERTIFICATION

I hereby certify that the answers I have made to all of the questions on this declaration are true to the best of my knowledge. I understand that if this declaration is not completed in its entirety, it will not be processed and I will be automatically disqualified. I understand that I am responsible for the correctness of this declaration. I understand that failure to disclose the provision of material assistance to an organization identified on the U.S. Department of State Terrorist Exclusion List, or knowingly making false statements regarding material assistance to such an organization is a felony of the fifth degree. I understand that any answer of "yes" to any question, or the failure to answer "no" to any question on this declaration shall serve as a disclosure that material assistance to an organization identified on the U.S. Department of State Terrorist Exclusion List has been provided by myself or my organization. If I am signing this on behalf of a company, business or organization, I hereby acknowledge that I have the authority to make this certification on behalf of the company, business or organization referenced on page 1 of this declaration.

APPLICANT SIGNATURE	DATE
X	April 30, 2012

ATTACHMENT 3

VENDOR INFORMATION FORM

All parts of the form must be completed by the vendor. Incomplete forms will be returned. The information must be legible. Ensure this is the latest version of the form at www.ohiopharmaceuticals.ohio.gov.

SECTION 1 – PLEASE SPECIFY TYPE OF ACTION

- [x] NEW (W-9 OR W-9SCI FORM ATTACHED)
- [ ] CHANGE OF CONTACT PERSON/INFORMATION
- [ ] ADDITIONAL ADDRESS – (A COPY OF AN INVOICE OR A LETTER INCLUDING THE ADDRESS IS REQUIRED)
- [ ] CHANGE OF ADDRESS – (PLEASE PROVIDE OLD ADDRESS BELOW OR ATTACH LETTER)

ADDRESS TO BE REPLACED:

- [ ] CHANGE OF TIN (W-9 & LETTER OF CLARIFICATION OF CHANGE, WHICH INCLUDES NEW & OLD TIN IS REQUIRED)
- [ ] CHANGE OF NAME (W-9 & LETTER OF CLARIFICATION OF CHANGE, MUST INCLUDES NEW & OLD NAME IS REQUIRED)
- [ ] CHANGE OF PAY TERMS
- [ ] CHANGE OF PO DISPATCH METHOD
- [ ] OTHER _____

SECTION 2 – PLEASE PROVIDE VENDOR INFORMATION

LEGAL BUSINESS OR INDIVIDUAL NAME: (MUST MATCH W-9 or W-9SCI Form)
LAW OFFICE OF ERIC A. JONES, LLC

BUSINESS NAME, TRADE NAME, DOING BUSINESS AS (IF DIFFERENT THAN ABOVE)

FEDERAL EMPLOYER ID (EIN) OR SOCIAL SECURITY NUMBER (SSN): [redacted]

SECTION 3 – PLEASE PROVIDE COMPLETE ADDRESS

ADDRESS:		COUNTY:
500 S HIGH STREET, SUITE 100		FRANKLIN
CITY: COLUMBUS	STATE: OH	ZIP CODE: 43215

SECTION 4 – ADDITIONAL ADDRESS (IF MORE THAN 2 ADDRESSES, PLEASE INCLUDE A SEPARATE SHEET)

ADDRESS:		COUNTY:
CITY:	STATE:	ZIP CODE:

[redacted]

NAME: Eric A. Jones

WEBSITE: www.ericjoneslaw.com

PHONE: 914-[redacted] FAX: 914-234-[redacted] EMAIL: EJONES@ERICJONESLAW.COM

PREFERRED METHOD OF BEING CONTACTED: (CHOOSE ONE) ☐ PHONE ☒ EMAIL

[redacted]

NAME: Eric A. Jones

EMAIL: EJONES@ERICJONESLAW.COM PHONE: 914-[redacted]

[redacted]

☐ 2/10 NET 30 ☒ NET 30 ☐ NET 45 ☐ NET 60 ☐ NET 90

EMAIL ☒ FAX: 914-234-[redacted]

PRINT NAME: ERIC A JONES

SIGNATURE: [DIGITAL SIGNATURES NOT ACCEPTED AT THIS TIME] DATE: April 30, 2012

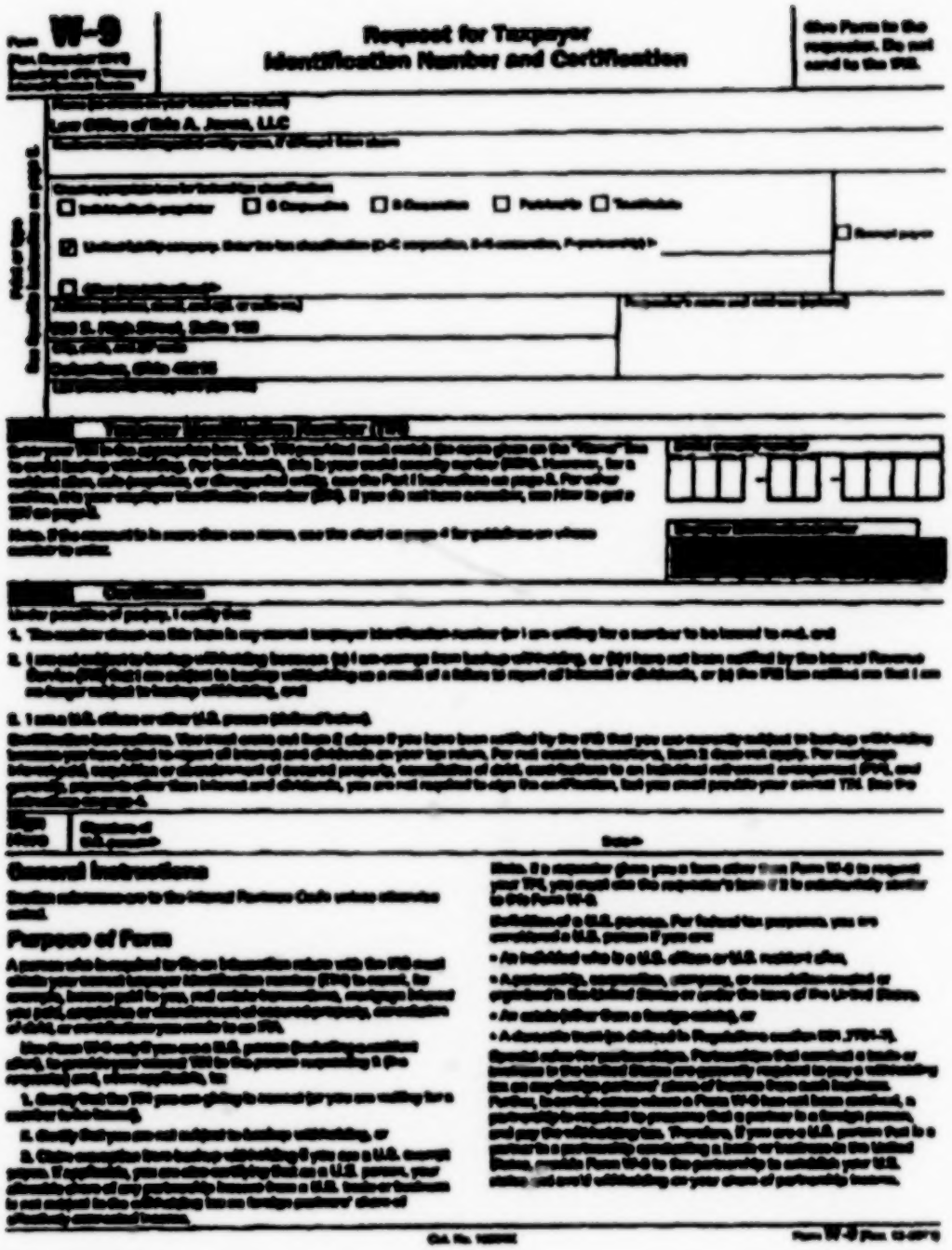
AGENCY CONTACT NAME/EMAIL/PHONE:

COMMENTS:

Note: This document contains sensitive information. Sending via non-secure channels, including e-mail and fax can be a potential security risk.

[redacted]

0944-5657 REV. 11/1/2011



Form **W-9**

Request for Taxpayer Identification Number and Certification

Give Form to the requester. Do not send to the IRS.

Name (as shown on your income tax return)

Law Office of Eric A. Jones, LLC

Business name/disregarded entity name, if different from above

Check appropriate box for federal tax classification:

☐ Individual/sole proprietor ☐ C Corporation ☐ S Corporation ☐ Partnership ☐ Trust/estate

☒ Limited liability company. Enter tax classification (C=C corporation, S=S corporation, P=partnership) ▶

☐ Other (see instructions) ▶

☐ Exempt payee

Address (number, street, and apt. or suite no.)

[illegible] S. High Street, Suite [illegible]

City, state, and ZIP code

Columbus, Ohio [illegible]

Requester's name and address (optional)

List account number(s) here (optional)

Taxpayer Identification Number (TIN)

Enter your TIN in the appropriate box. The TIN provided must match the name given on the "Name" line to avoid backup withholding. For individuals, this is your social security number (SSN). However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 3. For other entities, it is your employer identification number (EIN). If you do not have a number, see How to get a TIN on page 3.

Note. If the account is in more than one name, see the chart on page 4 for guidelines on whose number to enter.

Social security number

☐☐☐-☐☐-☐☐☐☐

Employer identification number

[redacted]

Certification

Under penalties of perjury, I certify that:

1. The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), and
2. I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding, and
3. I am a U.S. citizen or other U.S. person (defined below).

Certification instructions. You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the certification, but you must provide your correct TIN. See the instructions on page 4.

Sign Here | Signature of U.S. person ▶ | Date ▶

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Purpose of Form

A person who is required to file an information return with the IRS must obtain your correct taxpayer identification number (TIN) to report, for example, income paid to you, real estate transactions, mortgage interest you paid, acquisition or abandonment of secured property, cancellation of debt, or contributions you made to an IRA.

Use Form W-9 only if you are a U.S. person (including a resident alien), to provide your correct TIN to the person requesting it (the requester) and, when applicable, to:

1. Certify that the TIN you are giving is correct (or you are waiting for a number to be issued),
2. Certify that you are not subject to backup withholding, or
3. Claim exemption from backup withholding if you are a U.S. exempt payee. If applicable, you are also certifying that as a U.S. person, your allocable share of any partnership income from a U.S. trade or business is not subject to the withholding tax on foreign partners' share of effectively connected income.

Note. If a requester gives you a form other than Form W-9 to request your TIN, you must use the requester's form if it is substantially similar to this Form W-9.

Definition of a U.S. person. For federal tax purposes, you are considered a U.S. person if you are:

- An individual who is a U.S. citizen or U.S. resident alien,
- A partnership, corporation, company, or association created or organized in the United States or under the laws of the United States,
- An estate (other than a foreign estate), or
- A domestic trust (as defined in Regulations section 301.7701-7).

Special rules for partnerships. Partnerships that conduct a trade or business in the United States are generally required to pay a withholding tax on any foreign partners' share of income from such business. Further, in certain cases where a Form W-9 has not been received, a partnership is required to presume that a partner is a foreign person, and pay the withholding tax. Therefore, if you are a U.S. person that is a partner in a partnership conducting a trade or business in the United States, provide Form W-9 to the partnership to establish your U.S. status and avoid withholding on your share of partnership income.

Cat. No. [illegible] Form W-9 (Rev. [illegible])

ATTACHMENT 4

[Letterhead of Mike DeWine
Ohio Attorney General]

DEMOGRAPHICS

Eric A. Jones
Law Office of Eric A. Jones, LLC

Please provide our office with information on the composition of your staff. Please include totals for all employees, partners, associates, of counsel, shareholders and members.

	Nationwide	Ohio Only
Total Number of Employees	16	16
Total Number of Women	9	9
% of Women Employees	56%	56%
Total Number of Minorities	5	5
% of Minority Employees	31%	31%

Is your firm minority owned? Yes ☐ No ☒

Is your firm female owned? Yes ☐ No ☒

ATTACHMENT 5

Ohio | Bureau of Workers' Compensation

30 W. Spring St.
Columbus, OH 43215

Certificate of Premium Payment

This certifies the employer listed below has paid into the Ohio State Insurance Fund as required by law. Therefore, the employer is entitled to the rights and benefits of the fund for the period specified. For more information, call 1-800-OHIOBWC.

This certificate must be conspicuously posted.

Policy No. and Employer	Period Specified Below
1558970	03/14/2012 THRU 08/31/2012

LAW OFFICE OF ERIC A JONES LLC
580 S HIGH ST
COLUMBUS OH 43215-5642

ohiobwc.com

Administrator/CEO

You can reproduce this certificate as needed.

Ohio Bureau of Workers' Compensation

Required Posting

Effective Oct. 13, 2004, Section 4123.54 of the Ohio Revised Code requires notice of rebuttable presumption. Rebuttable presumption means an employee may dispute or prove untrue the presumption (or belief) that alcohol or a controlled substance not prescribed by the employee's physician is the proximate cause (main reason) of the work-related injury.

The burden of proof is on the employee to prove the presence of alcohol or a controlled substance was not the proximate cause of the work-related injury. An employee who tests positive or refuses to submit to chemical testing may be disqualified for compensation and benefits under the Workers' Compensation Act.

Ohio | Bureau of Workers' Compensation

You must post this language with the certificate of premium payment.

OP-29 BWC-1629 7/1/08

ATTACHMENT 6

[Letterhead of Ohio
Department of Administrative Services]

4/23/2012

Eric Jones
Law Office of Eric A Jones
580 South High St, Suite 100
Columbus, OH 43215

Dear Eric Jones:

SUBJECT: Affirmative Action Program Verification
Effective Dates: 04/23/2012 through 04/22/2013

As you are aware, a company desiring to participate in the State of Ohio procurement process must demonstrate to this Office that the company has complied with all applicable federal and state affirmative action programs for at least the last year.

After careful review of the affirmative action documentation you provided to this office, the Equal Opportunity Division of the Ohio Department of Administrative Services has determined that Law Office of Eric A Jones satisfactorily meets the requirements set forth in Section 125.111(B) of the Ohio Revised Code as is required for participation in the State of Ohio procurement process. This letter shall serve as the state's official certification to this effect.

Please note that the Equal Opportunity Division may conduct an audit of the Law Office of Eric A Jones's affirmative action program to determine the

company's continued compliance with Section 125.111 of the Ohio Revised Code.

As the Affirmative Action Program Verification indicates, the State of Ohio values diversity among its business partners and their employees, and hopes to see them grow and prosper. Consequently, we are delighted to be able to assist your company by approving your affirmative action program efforts. If you need any assistance or have questions about the Affirmative Action Program Verification, its objectives or its operation, please contact the Equal Opportunity Division's Construction Compliance Unit at 614.466.8380.

Sincerely,

/s/ Richard M. Scott

Richard M. Scott
State EEO Coordinator
Ohio Department of Administrative Services

ATTACHMENT 7

OBLIC

OHIO BAR LIABILITY INSURANCE COMPANY

DECLARATIONS

PROFESSIONAL LIABILITY POLICY

(THIS IS A CLAIMS-MADE AND REPORTED POLICY, READ CAREFULLY)

Policy No. 296733 Firm Number: 9101

Item 1. Named Insured(s) and Office Address:

Law Office of Erin A Joyce LLC
500 S High St
Ste 100
Columbus, OH 43215

Item 2. Policy Periods: From: May 12, 2011 To: May 12, 2012 12:01 A.M., Eastern Standard Time at the address of Named Insured as stated herein

Item 3. Limits of Liability: $250,000 to all claims arising out of the same, related or continuing "Professional Services"

$500,000 aggregate per policy period

Item 4. Deductible Amount: $5,000
(Includes Claims Expense)

Item 5. Total Policy Premium $2,853

OBLIC
OHIO BAR LIABILITY INSURANCE COMPANY

DECLARATIONS

PROFESSIONAL LIABILITY POLICY

(THIS IS A CLAIMS-MADE AND REPORTED POLICY, READ CAREFULLY)

Policy No. 236733 Firm Number: 9101

Item 1. Named Insured(s) and Office Address:

Law Office of Eric A Jones LLC
500 S High St
Ste 100
Columbus, OH 43215

Item 2. Policy Period: From: May 12, 2013 To: May 12, 2013 12:01 A.M., Eastern Standard Time at the address of Named Insured as stated herein

Item 3. Limits of Liability: $250,000 to all claims arising out of the same, related or continuing "Professional Services"

$500,000 aggregate per policy period

Item 4. Deductible Amount: (Includes Claims Expense) $5,000

Item 5. Total Policy Premium $4,624

ATTACHMENT 8

THE SUPREME COURT OF OHIO

CERTIFICATE

I, SUSAN B. CHRISTOFF, Director of the Attorney Services Division of the Supreme Court of Ohio, do hereby certify that I am the custodian of the records of the Office of Attorney Services of the Supreme Court and that the Attorney Services Division is responsible for reviewing Court records to determine the status of Ohio attorneys. I further certify that, having fulfilled all of the requirements for admission to the practice of law in Ohio,

Eric Alan Jones

was admitted to the practice of law in Ohio on May 14, 2007; has registered as an active attorney pursuant to the Supreme Court Rules for the Government of the Bar of Ohio; is in good standing with the Supreme Court of Ohio; and is entitled to practice law in this state.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court, this 18th day of April, 2012.

/s/ SUSAN B. CHRISTOFF
Director, Attorney Services Division

/s/ Attorney Services Specialist

THE SUPREME COURT OF OHIO

CERTIFICATE

I, SUSAN B. CHRISTOFF, Director of the Attorney Services Division of the Supreme Court of Ohio, do hereby certify that I am the custodian of the records of the Office of Attorney Services of the Supreme Court and that the Attorney Services Division is responsible for reviewing Court records to determine the status of Ohio attorneys. I further certify that, having fulfilled all of the requirements for admission to the practice of law in Ohio,

Dustin Robert Garris

was admitted to the practice of law in Ohio on November 08, 2010; has registered as an active attorney pursuant to the Supreme Court Rules for the Government of the Bar of Ohio; is in good standing with the Supreme Court of Ohio; and is entitled to practice law in this state.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court, this 18th day of April, 2012.

/s/ SUSAN B. CHRISTOFF
Director, Attorney Services Division

/s/ Attorney Services Specialist

THE SUPREME COURT OF OHIO

CERTIFICATE

I, SUSAN B. CHRISTOFF, Director of the Attorney Services Division of the Supreme Court of Ohio, do hereby certify that I am the custodian of the records of the Office of Attorney Services of the Supreme Court and that the Attorney Services Division is responsible for reviewing Court records to determine the status of Ohio attorneys. I further certify that, having fulfilled all of the requirements for admission to the practice of law in Ohio,

Brett Eric Schmied

was admitted to the practice of law in Ohio on November 9, 2009; has registered as an active attorney pursuant to the Supreme Court Rules for the Government of the Bar of Ohio; is in good standing with the Supreme Court of Ohio; and is entitled to practice law in this state.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court, this 18th day of April, 2012.

/s/ SUSAN B. CHRISTOFF
Director, Attorney Services Division

/s/ Attorney Services Specialist

THE SUPREME COURT OF OHIO

CERTIFICATE

I, SUSAN B. CHRISTOFF, Director of the Attorney Services Division of the Supreme Court of Ohio, do hereby certify that I am the custodian of the records of the Office of Attorney Services of the Supreme Court and that the Attorney Services Division is responsible for reviewing Court records to determine the status of Ohio attorneys. I further certify that, having fulfilled all of the requirements for admission to the practice of law in Ohio,

Sonia Tanferi Walker

was admitted to the practice of law in Ohio on May 17, 1999; has registered as an active attorney pursuant to the Supreme Court Rules for the Government of the Bar of Ohio; is in good standing with the Supreme Court of Ohio; and is entitled to practice law in this state.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court, this 18th day of April, 2012.

/s/ SUSAN B. CHRISTOFF
Director, Attorney Services Division

/s/ Attorney Services Specialist

THE SUPREME COURT OF OHIO

CERTIFICATE

I, SUSAN B. CHRISTOFF, Director of the Attorney Services Division of the Supreme Court of Ohio, do hereby certify that I am the custodian of the records of the Office of Attorney Services of the Supreme Court and that the Attorney Services Division is responsible for reviewing Court records to determine the status of Ohio attorneys. I further certify that, having fulfilled all of the requirements for admission to the practice of law in Ohio,

Robert Austin Flaugher

was admitted to the practice of law in Ohio on November 12, 1996; has registered as an active attorney pursuant to the Supreme Court Rules for the Government of the Bar of Ohio; is in good standing with the Supreme Court of Ohio; and is entitled to practice law in this state.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court, this 18th day of April, 2012.

/s/SUSAN B. CHRISTOFF
Director, Attorney Services Division

/s/Attorney Services Specialist

STATE OF WEST VIRGINIA

I, Rory, L. Perry II, Clerk of the Supreme Court of Appeals of West Virginia, hereby do certify that Robert A. Flaugher, of Columbus, Ohio, an attorney duly licensed to practice law in this State, was admitted to practice law before the Supreme Court of Appeals of West Virginia, the highest court of the State, on the 15th day of October, 1997; that he is an attorney in good standing in said Court and is currently on active status and that his private and professional characters are good.

Given under my hand and seal of said Court, at Charleston, West Virginia, this 19th day of April, 2012, and in the 149th year of the State.

/s/ Rory L. Perry II
Clerk, Supreme Court of Appeals of West Virginia

[seal]

ATTACHMENT 9

[Letterhead of
Law Office of Eric A. Jones, LLC]

[REDACTED]

ATTACHMENT 10

ERIC A. JONES
500 S. High Street, Suite 100
Columbus, Ohio 43215
(614) 585-9998
ejones@ericjonesLaw.com

EDUCATION

Capital University Law School, Columbus, Ohio
Juris Doctor, January 2007

Capital University, Columbus, Ohio
Masters of Business Administration, August 2002

Ohio University, Athens, Ohio
Bachelor of Science in Communications, June 1995

PROFESSIONAL EXPERIENCE

LAW OFFICE OF ERIC A. JONES, LLC
- Provide legal services to businesses and individuals throughout Ohio.
- Serve as Outside General Counsel for the Ohio Osteopathic Association.
- Appointed Special Counsel for the Ohio Attorney General for Collections Enforcement and Revenue Recovery.
- Represent health care professionals and individuals on a wide range of legal issues statewide.

OHIO DEPARTMENT OF JOB AND FAMILY SERVICES, *August 2005 to July 2007*
Assistant Chief, Bureau of Managed Health Care, April 2006 to July 2007
- Direct multiple teams responsible for all activities related to the Ohio's Medicaid managed care program.
- Developed and implemented the Ohio Bureau of Managed Health Care's strategic initiatives to expand Medicaid managed care to 1.25 million Covered Families and Children and Aged Blind and Disabled consumers.
- Responsible for developing managed care contracts, program requirements and monitoring for compliance.
- Directed Ohio's procurement for selecting managed care plans to serve Ohio's $4 billion managed care program.
- Coordinate all administrative rule & proposed development, waiver &/or state plan amendments to establish & maintain federal approval for the Medicaid managed care program and other managed care initiatives.

Assistant Section Chief of Contract Administration, Bureau of Managed Health Care, August 2005 to April 2006
- Directed the operations of the Contract Administration Section responsible for the oversight of multiple Medicaid managed care plans to ensure proper administration and implementation of Medicaid services.
- Responsible for oversight of managed care plan compliance with federal & state regulations, rules & laws.

OHIO STATE MEDICAL ASSOCIATION, January 2005 to August 2005
Aid to General Counsel
- Conducted legal research and drafted position papers for the Chief Legal Counsel.

VAN WERT COUNTY HOSPITAL, June 2000 to May 2003
Vice President, Physician & Community Services
- Managed the Medical Staff Services office responsible for physician recruitment, physician relations and provider credentialing.

- Negotiated employment and lucrative guarantee contracts with physicians.
- Developed and maintained hospital wide strategic plans.
- Directed all aspects of the hospital's marketing activities and public relations.
- Provided hospital wide staff educational programs on leadership and client service training.
- Served as hospital administrative representative on all medical staff committees.
- Monitored and improved patient satisfaction and achieved Press Ganey rankings in the 90th percentile or above in patient satisfaction for inpatient, outpatient and emergency services.

COMPMANAGEMENT, June 1999 to June 2000
Regional Account Manager
- Represented employers at workers' compensation hearings averaging 40 hearings per week.
- Responsible for sales and service to employers and employer groups.

HEALTH POWER HMO, July 1995 to June 1999
Manager, Provider & Member Services, July 1996 to June 1999
- Managed staff responsible for negotiating contracts with physicians, hospitals and ancillary providers.
- Analyzed provider network and market trends to strategically plan future development needs.
- Directed Provider Credentialing Department responsible for credentials verification in accordance with NCQA guidelines.
- Managed Member and Provider Services call center responding to an average of 500 calls per day.
- Responsible for PHO outsourcing and delegated credentialing agreements.

Provider Relations Representative, July 1996 to December 1997
- Developed provider networks in new service areas through negotiating and contracting with physicians, hospitals, PHOs and ancillary providers.
- Performed credentialing audits of PHO provider networks.
- Assessed provider compliance with MCO policies and procedures.
- Resolved provider concerns regarding contracts, fee schedules, payments and health plan policies.
- Collaborated with providers for joint marketing activities.

Credentialing Specialist, July 1995 to July 1996
- Responsible for the collection and verification of provider credentials per NCQA guidelines.
- Maintained over 3000 provider credentials files.
- Maintained provider database and quality control of provider directory.

Robert A. Flaugher, Esq.

681 Monumentary Drive
Pickerington, Ohio 43147
Telephone (614) 205-1836

EDUCATION

Capital University Law School, Columbus, OH May 1996
GPA: 3.21 on 4.0 scale
Class Rank: Top 20%
Case Leads, Order of the Coif

Marshall University, Huntington, WV May 1989
Bachelor of Arts in Criminal Justice with minors in Accounting, Spanish and Psychology
Office in Tau Kappa Epsilon Fraternity, Member of the University's Greek Judicial Board

PROFESSIONAL EXPERIENCE

The Law Office of Eric A. Jones, LLC, Columbus, OH April 2011 to Present

- **Practice areas include general business litigation, commercial and consumer litigation, and personal injury in Ohio and West Virginia**
- **Merge commercial and consumer litigation clients into existing law practice**
- **Serve as an appointed mediator in Franklin County**

Bono & Parker Co., L.P.A., Columbus, OH February 2008 to April 2011

- **Practice areas include general business litigation, commercial litigation, bankruptcy and foreclosure**
- **Create and profitably maintain a West Virginia legal department within the firm as the only lawyer in charge of West Virginia legal matters. This responsibility includes all facets of subrogation, bankruptcy and commercial and consumer litigation matters**
- **Serve as an appointed mediator in Franklin County**

Frank & Wooldridge Co., L.P.A., Columbus, OH May 2005 to February 2008

- **Practice areas include general business litigation, commercial litigation and consumer collection**
- **Successfully merged the Law Office of Robert A. Flaugher, LLC with Frank & Wooldridge, bringing in several business clients F&W had never worked with before**

Law Office of Robert A. Flaugher, LLC, Pickerington, OH May 2004 to May 2005

- **Retained several business clients from both Lane, Alton & Horst and Weltman, Weinberg & Reis that came with me**
- **Practice included general business litigation on both plaintiff and defendant side, professional malpractice and personal injury**
- **Staff included part-time paralegal and secretary**
- **Approached by Frank & Wooldridge in spring of 2005 to merge my practice with theirs to increase their civil litigation footprint**

Weltman, Weinberg & Reis Co., L.P.A., Columbus, OH February 1998 to December 1998
Senior Attorney September 2002 to May 2004

- **Practice Areas: Commercial Litigation and Lender Liability**
- **Experienced in all facets of trial preparation including first chair trial experience**

- Created and profitably maintained a West Virginia legal department within the firm and was the only lawyer in charge of West Virginia legal matters for all 6 WWR offices-Developed a large client base made up of regional and national institutional clients
- Conducted several seminars for clients relating to Ohio and West Virginia civil litigation
- Managed West Virginia and Ohio Commercial Litigation departments

Lane, Alton & Horst, Columbus, OH April 2001 to September 2002
Litigation Associate

- Practice Areas: Product Liability, Insurance Defense, General Defense Litigation and Commercial Litigation
- Experienced in all facets of trial preparation including first chair trial experience-Representing clients in OH and WV courts

Hendrickson & Long, P.L.L.C., Charleston, WV January 1999 to April 2001
Litigation Associate

- Practice Areas: Product Liability, Insurance Defense, General Defense Litigation and Commercial Litigation
- Experienced in all facets of trial preparation including first chair jury trial and bench trial experience- Representing clients in OH and WV courts
- Chosen by firm to attend the nationally renowned Trial Advocacy Institute at the University of Virginia School of Law (January 2007)

Willamette Industries, Inc. Western Kraft, Matthews (Charlotte), NC February 1998 to August 1998
Outside Sales Representative-Corrugated Container Division

- Responsible territory included all of North Carolina and parts of South Carolina
- My customer base included Eveready, Plane Hut, Rubbermaid and Bass Laboratories

AWARDS RECEIVED

- Member of the Capital University Moot Court Board (1994-1996)
  - Chief Justice (1996)
  - Associate Chief Justice (1995)
- Winner of the 1996 Capital University Upperclass Moot Court Competition
- Finalist in the 1994 Capital University First Year Moot Court Competition
- Presented with the CALI Book Award for excellence in the study of Trial Advocacy at Capital University (1995)
- Presented with the American Jurisprudence Book Award by *Lawyers Cooperative Publishing* for excellence in the study of the Legal Profession at Capital University (1994)

PROFESSIONAL MEMBERSHIPS

- Member of the Columbus Bar Association, and the Ohio and West Virginia Bar Associations
- Licensed in all state and federal courts in Ohio and West Virginia
- Two-term Member of the Capital University Law School Alumni Board of Directors (2001-2004)
- Trained mediator (2019)

References Upon Request

Brett E. Schmied

2592 Waterfall Lane • Columbus, OH 43215 • 614.546.9024 • bschmied@brettjonnelaw.com

BAR ADMISSION

State of Ohio, November 2009
Practicing in all 88 Counties in Ohio
Supreme Court of Ohio Registration Number: 0085076

EDUCATION

Ohio Northern University College of Law, Ada, OH
Jeris Doctor (May 2009)

- GPA: 3.38/4.0
- Dean's List (2 Semesters)
- Book Award (awarded to the highest grade in the class), Remedies

Muskingum College, New Concord, OH
Bachelor of Arts, Magna Cum Laude, In Speech Communication, Minor in Political Science (May 2006)

- GPA: 3.658/4.0
- Dean's List (7 semesters)

LEGAL EXPERIENCE

Law Office of Eric A. Jones, LLC, Columbus, OH
Attorney (January 2010 - Present)

- Take and prepare for hearings
- Give legal advice
- Draft motions and other legal documents
- Research legal issues
- Represent clients in both civil and criminal law
- Assisting clients execute judgments

District Judge Gregory L. Frost, Columbus, OH
Extern (May 2008 – July 2008)

- Drafted memoranda and other legal documents
- Researched legal issues and ascertained facts
- Communicated with Judge Frost and his law clerks
- Drafted orders for Judge Frost
- Analyzed evidence

AFFILIATIONS

Member, Ohio State Bar Association
Member, Columbus Bar Association and Social Security Disability Committee

CLE

Ohio Elder Law Institute Highlights – 3 hours.

Sonia T. Walker

9838 Malibu Court • Plain City, Ohio 43064

(614)795-0397 (Day) • [redacted]

BAR ADMISSIONS:

- STATE OF OHIO, 1998 Supreme Court ID: 0070422
- UNITED SATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, 2001
- Actively practicing in Ohio's 88 Counties

SUMMARY OF QUALIFICATIONS:

- Experienced Attorney with a comprehensive background in trial law for civil matters
- Proven ability to litigate cases involving Personal Injury, Insurance Defense, Political Subdivision Liability, Wrongful Termination, FMLA and COBRA violations

PROFESSIONAL EXPERIENCE:

Jan. 10-Present LAW OFFICE OF ERIC A. JONES Columbus, Ohio

Of Counsel

- Represent Social Security Disability Claimants from initial filing through appeal
- Perform all aspects of litigation, including discovery, motion drafting and trial preparation
- Participate in mediation and settlement negotiations on civil matters

May. 00-Nov. 01 ISAAC, BRANT, LEDMAN & TEETOR Columbus, Ohio

Associate - Litigation

- Defend civil litigants in personal injury, political subdivision liability and appellate matters
- Successfully argued before 6th Circuit Court of Appeals
- Drafted 6th Circuit Appellate Briefs
- Maintained daily client contact and management of case files

COLLEY, SHROYER & ABRAHAM Columbus, Ohio

Feb. 03-Nov. 03 *Associate*

- Negotiated settlements on personal injury matters
- Drafted appellate briefs

Apr. 97-Nov. 97 *Law Clerk*

- Prepared memorandum contra in response to motion for summary judgement
- Drafted demand letters and complaints

Nov. 97-May. 00 FRANKLIN COUNTY PROSECUTOR'S OFFICE Columbus, Ohio

Assistant Prosecuting Attorney

- Tried over 25 cases, including Delinquencies, Abuse, Neglect, and Dependencies
- Negotiated plea bargains on average of 5-10 cases daily
- Worked directly with victims and police; subpoenaed witnesses as necessary
- Prepared and presented cases to the Grand Jury for indictment

Sept. 96-May. 97 HABITAT FOR HUMANITY Columbus,

Ohio

Legal Research

- Performed pro bono research of housing and lending issues

EDUCATION & MEMBERSHIPS:

CAPITAL UNIVERSITY LAW SCHOOL Columbus, Ohio

Juris Doctorate, Cum Laude (May, 1998)

HONORS:

Order of the Barristers

CALI Academic Excellence Award

Vice Dean, Delta Theta Phi Law Fraternity

ACTIVITIES:

Order of the Curia

National Moot Court Team

Legal Study in Florence, Italy

Vice President, Law Students for the Advancement of Ethics and Professionalism

OHIO UNIVERSITY Athens, Ohio

Bachelor of Science in Communication

Graduated Cum Laude; Recipient of Outstanding Senior Award

COLUMBUS BAR ASSOCIATION - Member

SOCIAL SECURITY DISABILITY COMMITTEE of the Columbus Bar Association - Member

Dustin R. Garris

191 E. Gates St. Columbus, OH 43206 • 614-937-2274 • [redacted]

BAR ADMISSION

State of Ohio, November 2010
Supreme Court ID: 0086291
Actively practicing in all 88 counties
Member of the Ohio State Bar Association, Columbus Bar Association, and American Bar Association

EMPLOYMENT HISTORY

The Law Office of Eric A. Jones, LLC, Columbus, OH
Attorney (November 2010-Present)
Law Clerk (December 2009-November 2010)

- Research and prepare various motions, briefs, and responses for civil and collection cases.
- Negotiate settlements in personal injury and collection cases.
- Conduct interviews and ascertain potential clients.
- Prepare for and handle hearings regarding workers' compensation, social security, and small claims matters.

EDUCATION

CAPITAL UNIVERSITY LAW SCHOOL, Columbus, OH
Juris Doctor, 2010

- Successfully completed externship program as well as a full academic year in the Legal Clinic
- Dean's List

THE OHIO STATE UNIVERSITY, Columbus, OH
Bachelor of Science in Business Administration, 2007

- Accounting Major
- Dean's List

LEGAL EXPERIENCE

CAPITAL UNIVERSITY LAW SCHOOL LEGAL CLINIC
Certified Legal Intern (August 2009-May 2010)

- Negotiated plea agreements with prosecutors.
- Researched, composed, and filed motions and responses on behalf of clients.
- Drafted and executed wills.
- Represented various clients with domestic issues including child custody and divorce.

EXTERNSHIP IN THE FRANKLIN COUNTY COMMON PLEAS COURT
Extern to the Honorable Judge Daniel Hogan (Summer 2009)

- Reviewed motions and drafted summary judgment opinions pertaining to civil matters.
- Observed criminal and civil trials.

Doc. 48-12 **EXHIBIT C7**

[Letterhead of
Wiles, Boyle, Burkholder & Bringardner]

May 1, 2012

Mike DeWine
Ohio Attorney General
Ohio Attorney General's Office
Legal Services Section
30 E. Broad St., 17th Fl.
Columbus, OH 43215

Re: Ohio Attorney General's Office Request for Qualification for Special Counsel for Fiscal Year 2013

Dear Mr. DeWine:

I am writing this to comply with the requirement that we submit the Request for Qualification with a transmittal letter. This letter hereby affirms that all statements are true and accurate.

Very truly yours,

/s/ Mark J. Sheriff
Mark J. Sheriff
300 Spruce St., Floor 1
Columbus, OH 43215
(T) 221-5216
(F) 221-0624
msheriff@wileslaw.com

[Letterhead of
Wiles, Boyle, Burkholder & Bringardner]

May 1, 2012

Mike DeWine
Ohio Attorney General
Ohio Attorney General's Office
Legal Services Section
30 E. Broad St., 17th Floor
Columbus, OH 43215

Re: Ohio Attorney General's Office Request for Qualification for Special Counsel for Fiscal Year 2013

Dear Mr. DeWine:

I am responding to the Request that our office submit certain information via electronic mail on or before the close of business on Friday, May 4, 2012 with respect to our appointment and/or continued appointment as Special Counsel for the Attorney General's Office.

Mark J. Sheriff is now designated as Special Counsel. I am the attorney and Partner in our office in charge of our Collection Group and basically handle and supervise the handling of all the collection matters we have received from the Attorney General's Office over the last several years. I have specialized in the area of collection for the last 41 years or virtually my entire career. I am a graduate of Oho State University and earned by J.D. degree from the University of Cincinnati, College of Law, with honors, where I was also Order of the Coif as well as Research and Survey Editor for the Law Review. I am Past President of the Commercial Law

League of America and past Chairman of the Creditor's Rights Section of the Commercial Law league of America and I am also Chairman of the League's Finance Committee. I will be sworn in as Recording Secretary of the Commercial Law League of America the first week of May 2012 and will serve a one (1) year term on the Board of Governors. I previously served as an Advisor to the National conference of Commissioners of Uniform State Laws with respect to revision of Article 2 of the U.C.C. I am currently certified as a Creditor's rights Specialist by the American Board of Certification and also served on both the Board and Executive Counsel of that Organization. I am a member of the Columbus Bar Association, the Ohio State Bar Association, District of Columbia Bar Association, the American Bar Association and the American Association for Justice previously known as the American Trial Lawyers Association. I am an active member of the Banking, Commercial Law and Bankruptcy Committee of the Ohio State Bar Association. I am also a Charter Member of the Ohio Creditors Attorney Association. I have an AV rating in Martindale-Hubbell which I have had for the last 20 years or longer. Additionally, I have also been recognized the last six to seven years by *Ohio Super Lawyers Magazine* as one of the top business litigators in the State of Ohio. I am a frequent speaker and have presented programs at the National Meeting of the American Bar Association, the National Association of Credit Managers (NACM) and the National Conference of Bankruptcy Judges as well as the Commercial Law League of America and the Ohio State Bar Association. I practice exclusively in the areas of Commercial Law,

Business, Civil and Corporate Litigation, Commercial and Retail Collections, personal and financial counseling and planning.

I was previously the Chairman of the Collection Department for the law firm of Luper, Sheriff & Neidenthal from 1974 through 2002 before my affiliation with the law firm of Wiles, Boyle, Burkholder & Bringardner Co., LPA in August 2002. I served on the Upper Arlington Board of Education from 1984 to 2000 and was President or Vice President 9 out of the 16 years I served. I also served in the United States Army from 1971 through 1973 and was honorably discharged with the rank of Captain. I was assigned to the Judge Advocates General's Office and handled collection matters for servicemen while I was in the Army.

Our office would like the opportunity to represent the Attorney General's Office in all matters related to collections, including all types of taxes, student loans, and Medicaid recoveries. We have handled all of those types of matters from the inception of our appointment as Special Counsel for the Ohio Attorney General's Office.

Very truly yours,

/s/ Mark J. Sheriff
Mark J. Sheriff

A. Required Documentation (available on our web site at:

www.OhioAttorneyGeneral.gov/CollectionsForms.

- o Cover Letter – Not to exceed two pages. Shall affirm that all statements are true and accurate. Should clearly communicate your knowledge, experience and ability to perform the work requested. Shall include the signer's mailing address, telephone number, fax number and e-mail address.
- o Affidavit of Eligibility (Please see attachment 1)
- o Declaration of Material Assistance (Please see Attachment 2)
- o Vendor ID & W-9 forms (Please see Attachment 3)
- o Firm Demographics Form (Please see Attachment 4)
- o Current Bureau of Workers' Compensation certificate (Please see Attachment 5)
- o Affirmative Action Plan Verification Form with the Ohio Department of Administrative Services (Please see Attachment 6)

B. Certifications Required

You must provide the following certifications to be considered for appointment as a Collections Special Counsel.

1. A copy of your current professional liability insurance demonstrating coverage by a company authorized to do business in Ohio with a Best rating of at least "A" (Include as an attachment to your response).

Please see attachment 7

2. Ethics and Malpractice Certification that:

   a. No ethics complaints have been filed against you or your law firm within the last five (5) years that did not result in dismissal.

      Please see attachment 8

   b. No legal malpractice actions are pending or have been adversely decided against you or your law firm within the last five (5) years.

      Please see attachment 8

If such complaints or actions have occurred, please provide an explanation of facts and outcome

3. Certification that each attorney in your firm who would be involved with claims and cases assigned to you as Collections Special Counsel is a member in good standing of the Ohio bar, federal bar and/or state bar in which he or she has been admitted to the practice of law (please identify other states), and has not been disqualified to practice law in any jurisdiction or forum.

   Please see attachment 8

4. Certification that each attorney in your firm who would be involved with claims and cases assigned to you as Collections Special Counsel is not subject to an "unresolved" finding for recovery under R.C. 9.24. If the warranty is deemed to be false, the Retention Agreement will be deemed void ab initio, and Special Counsel may be required to repay to

the State of Ohio any funds paid under the Retention Agreement.

Please see attachment 8

C. <u>Disclosure of Conflict of Interest and other Collection Matters</u>

1. A list and explanation of any claims and lawsuits brought against any member of your firm, including any attorney or employee, alleging a violation of the Fair Debt Collection Practices Act within the last five (5) years.

   There have been no lawsuits filed against any member of our firm within the last five (5) years for violation of the Fair Debt Collection Practices Act. Additionally, there have been no claims made requiring us to disclose or submit them to our malpractice carrier in the past five (5) years.

2. A list and description of the systems you have in place to screen incoming accounts and claims to assure that your firm and the particular counsel who has accepted an appointment on a state collection matter does not have a conflict of interest, including representation of a private client in a matter against or competing with that of the State of Ohio.

   Conflict checks are run on our computer systems on any and all claims received by both the State of Ohio and/or any other client. We are able to immediately identify any conflicts of interest using this system.

We have never had any problems in that regard.

3. List and describe those matters where your past or present clients have an interest adverse to or competing with that of the State of Ohio.

None.

4. List and describe, including case caption, case number and court of those matters where you have, within the last five (5) years brought an action against or represented any State Client in a collection matter or bankruptcy proceeding. Describe the scope of that representation, the client involved and whether the representations are closed or current.

There have been no cases in the last five (5) years where we have brought an action against any state client in a collection matter or bankruptcy proceeding.

D. <u>Disclosure of Known Conflicts of Interest: Non-Collection Matters</u>

1. Outside of collection or bankruptcy matters, have you brought or currently have a claim or cause of action against the State of Ohio or any State Client? Provide a list of all such matters, including the case caption, case number and court, the scope of the representation and the name of your client and the name of the State Client with whom your client is adverse. Please designate in your response which representations are closed and which are current.

None.

2. List all employees and attorneys of your firm that have previously been employed by the Attorney General or a State Client at any time, including the name of the State Client, the duration of employment and position.

None.

3. List all employees and attorneys of your firm who are indebted to the State of Ohio and the case number, account numbers and State Client to whom the financial obligation is owed, and whether the account is in good standing, or certified as a past due debt to the Attorney General, other than current tax liabilities.

None.

E. Continuing Legal Education

List and describe those Continuing Legal Education ("CLE") seminars you and members of your firm have attended dealing with collection or bankruptcy law topics, including fair debt collection, within the last twenty-four (24) months. State the title, location, date and number of CLE credits awarded for the seminar and who attended.

Please see attachment 9

Section 5: Practice Areas

Please check each practice in which you are both qualified to practice and interested in representing State Clients:

_ **Bankruptcy Collection Matters** (If applying for Bankruptcy Counsel list the

bankruptcy courts where you have been admitted to practice and the courts in which you have actively and continuously represented clients .)

✓**General State Collections** (If you are seeking appointment to handle personal income tax or unemployment compensation fraud accounts, you must complete an Ohio SPR, available at www.OhioAttorneyGeneral.gov/CollectionsForms , and be able to demonstrate compliance with *Publication 1075: Tax information Security Guidelines for Federal, State and Local Agencies.* A copy of this publication is available at IRS.gov.)

✓**Medicaid Estate Recovery**

_**Subrogation Collections**

✓**University Collections** (If you are seeking appointment to handle claims or matters involving university debt, please explain the protections your office has in place to assure compliance with FERPA privacy practices.)

_**University Medical Center Collections** (If you are seeking appointment to handle claims or matters involving medical bills, workers' compensation, crime victims compensation, or other matters involving HIPAA, please explain the protections your office has in place to assure compliance with HIPAA privacy practices.)

✓**Local Debt** (If you are seeking appointment to handle local debt and you are currently under contract to collect for any local

government agency, board, commission or political subdivision, you may not receive assignments of local debt.)

Section 6: Experience and Resources

1. Describe your and your firm's past representation as special or outside counsel for the State of Ohio, including any State Clients represented.

   We have been doing work for the Attorney General's Office in excess of ten (10) years. During that time we have handled thousands of cases where we have filed suit or entered in an appearance in a bankruptcy proceeding on behalf of the State of Ohio. The Attorney General's Office has access to all of the files that we are handling and have handled on the CUBS System where we regularly and routinely put information.

2. Summarize the knowledge, expertise and experience you have in matters of state government collection, including particular State Clients and areas of practice.

   Please see attachment 9 – Mark Sheriff

   a. Do you have any collection experience with non-state clients?

      Yes, extensive experience over the last 40 years.

   b. Will the State of Ohio be your sole client?

      No.

3. If your firm has previously collected for any other local government agencies, boards, commissions or political subdivisions, provide a list of your clients during the previous five (5) year period.

   None.

4. If applying for Bankruptcy Counsel list the bankruptcy courts where you have been admitted to practice, and the bankruptcy courts in which you have actively and continuously represented clients. Please describe the clients you currently represent in bankruptcy (i.e. creditors, debtors, etc...).

   N/A

5. Provide the number of collection matters your firm currently handles on an annual basis; differentiate between State Clients and other clients.

   We handle over 3,000 collection matters on an annual basis for non-state clients. The State of Ohio would have computer records of the number of claims that they have sent us on an annual basis which has been numerous.

6. List and describe how you will ensure that the Attorney General and the State Clients have representation and counsel if the primary attorney on a given matter is temporarily unavailable.

   We have several other very experienced attorneys who specialize in collections and litigation who are employed by our office

who have the ability to step in and cover any given matter when special counsel is temporarily unavailable.

7. For each attorney expected to work under this assignment, please provide the following information:

Please see attachment 9

a. A detailed description of each attorney's collection and bankruptcy experience.

b. Years of collection law experience.

c. Percent of practice related to collection law matters.

d. Percent of practice in state court and percent of practice in federal court.

e. Attorney registration number, the names of each state and federal bar to which he or she is admitted to practice; and the courts before which he or she is actively practicing.

8. List and describe your collections computer system, including any software, cloud based computing, Integrated Voice Response, virtual environment, and/or VoIP systems utilized to collect debt. Any system that holds, processes, receives, sends, or otherwise

touches tax information must be IRS Publication 1075 compliant.

9. Describe how your existing systems provide the following:

   a. Ability to screen incoming accounts for potential conflicts with the Attorney General and any State Client.

      Our computer system has the ability to cross-reference all State of Ohio claims with other matters handled in our office and we routinely run conflict checks.

   b. Ability to segregate state accounts from the other business of the firm.

      All state accounts are separately segregated.

   c. Ability to document collection efforts.

      All collection efforts are documented and are able to be uploaded on the State of Ohio computer system.

   d. Ability to image documents.

      Yes, we have the ability to image documents and do it on a routine basis on all documents received.

   e. Your phone systems, including auto-dialer, call recording and monitoring capabilities.

      We do not use any auto dialers. We do not have call recording and monitoring capabilities.

   f. Ability to generate, track and retain records documenting collection activities, and share

these transactions electronically with the Attorney General.

We have full ability to do that and we have been doing that for several years.

g. Other systems utilized in collection of debt.

Access to credit reports, Accurint reports and skip tracing among others.

h. Legal researching systems.

We subscribe to Westlaw and have the ability to do full research on any and all legal issues.

i. Existing interfaces to update the Attorney General's Collections System.

All of those existing interfaces do exist and have been in operation for the last ten years with the Attorney General's Office.

j. Legal researching systems, such as Casemaker, Lexis/Nexis, Westlaw or other researching system.

See response to question (h) above.

k. List your skip tracing tools.

Accurint and Credit Reporting HNCs as well as independent research of public records.

10. Provide a list of particular counties of the state in which you wish to work.

We handle the entire state of Ohio.

11. Disaster Recovery Plan - Please attach a copy of your data disaster recovery plan.

Your plan should describe how you maintain security for you data and list any vendors who may have access to your data.

Please see attachment 10

Section 7: Curriculum Vitae

Please attach the curriculum vitae of each attorney or paralegal in your firm who would be involved with work assigned as Collections Special Counsel. Provide the following information:

1. Identify whether you or any of your partners or associates is an elected official or member of any board or commission at the state or local level. Describe the position(s) with specificity.

   Associate Jim Hughes is currently an Ohio State Senator.

2. For each person that will be assisting with collection work, please include: attorney registration number; the names of each state and federal bar to which he or she is admitted to practice; the courts before which he or she is actively practicing; bar association memberships; bar committee memberships and title or position in each, if any; professional and civic organizations; and any special awards or honors received.

   Please see attachment 9

ATTACHMENT NO. 1

[Letterhead of Mike DeWine
Ohio Attorney General]

AFFIDAVIT OF ELIGIBILITY FOR SPECIAL COUNSEL APPOINTMENT

STATE OF Ohio:

COUNTY OF Franklin:

The undersigned, being first duly sworn, deposes and says as follows:

1. I am under consideration for an appointment as outside counsel by Ohio Attorney General Mike DeWine, and make this affidavit to certify my eligibility for such an appointment.

2. I hereby certify that neither I nor my law firm is disqualified under Ohio Revised Code § 3517.13 from being awarded a contract by Attorney General Mike DeWine.

3. I certify that neither I nor any of my partners, or officers, directors, or shareholders of my firm nor the spouses of any such person have made contributions in excess of the limitations specified in R.C. § 3517.13.

4. I recognize that, pursuant to R.C. § 3517.992(R), whoever violates division (I) or (J) of R.C. § 3517.13 shall be fined up to one thousand dollars, and that any contract awarded to me in violation of either of those divisions may be rescinded.

/s/ Michael L. Close
SIGNATURE

Wiles, Boyle Burkholder & Bringardner
FIRM NAME

Michael L. Close
PRINTED NAME

Sworn to before me, and subscribed in my presence this 1st day of May, 2012.

/s/Deborah A. Sekerak
Notary Public, State of Ohio

[notary seal]

ATTACHMENT NO. 2

DECLARATION OF MATERIAL ASSISTANCE ("DMA")

OHIO DEPARTMENT OF PUBLIC SAFETY

OHIO HOMELAND SECURITY
http://www.homelandsecurity.ohio.gov

GOVERNMENT BUSINESS AND FUNDING CONTRACTS

In accordance with section 2909.33 of the Ohio Revised Code

DECLARATION REGARDING MATERIAL ASSISTANCE/NONASSISTANCE TO A TERRORIST ORGANIZATION

This form serves as a declaration by an applicant for a government contract or funding of material assistance/nonassistance to an organization on the U.S. Department of State Terrorist Exclusion List ("TEL"). Please see the Ohio Homeland Security Division Web site for a copy of the TEL.

Any answer of "yes" to any question, or the failure to answer "no" to any question on this declaration shall serve as a disclosure that material assistance to an organization identified on the U.S. Department of State Terrorist Exclusion List has been provided. Failure to disclose the provision of material assistance to such an organization or knowingly making false statements regarding material assistance to such an organization is a felony of the fifth degree.

For the purposes of this declaration, "material support or resources" means currency, payment instruments, other financial securities, funds, transfer of funds, and financial services that are in excess of one hundred dollars, as well as communications, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.

BUSINESS/ORGANIZATION NAME Wiles, Boyle, Burkholder & Bringardner Co. LPA			PHONE (614) 221-5216
BUSINESS ADDRESS 308 Spruce St			
CITY Columbus	STATE OH	ZIP 43215	COUNTY Franklin
BUSINESS/ORGANIZATION REPRESENTATIVE NAME Robert E. W. Sander			TITLE Administrator

DECLARATION

In accordance with section 2909.32 (A)(2)(b) of the Ohio Revised Code

For each question, indicate either "yes," or "no" in the space provided. Responses must be truthful to the best of your knowledge.

1. Are you a member of an organization on the U.S. Department of State Terrorist Exclusion List? ☐ Yes ☒ No
2. Have you used any position of prominence you have with any country to persuade others to support an organization on the U.S. Department of State Terrorist Exclusion List? ☐ Yes ☒ No
3. Have you knowingly solicited funds or other things of value for an organization on the U.S. Department of State Terrorist Exclusion List? ☐ Yes ☒ No
4. Have you solicited any individual for membership in an organization on the U.S. Department of State Terrorist Exclusion List? ☐ Yes ☒ No
5. Have you committed an act that you know, or reasonably should have known, affords "material support or resources" to an organization on the U.S. Department of State Terrorist Exclusion List? ☐ Yes ☒ No
6. Have you hired or compensated a person you knew to be a member of an organization on the U.S. Department of State Terrorist Exclusion List, or a person you knew to be engaged in planning, assisting, or carrying out an act of terrorism? ☐ Yes ☒ No

If an applicant is prohibited from receiving a government contract or funding due to a positive indication on this form, the applicant may request the Ohio Department of Public Safety to review the prohibition. Please see the Ohio Homeland Security Web site for information on how to file a request for review.

CERTIFICATION

I hereby certify that the answers I have made to all of the questions on this declaration are true to the best of my knowledge. I understand that if this declaration is not completed in its entirety, it will not be processed and I will be automatically disqualified. I understand that I am responsible for the correctness of this declaration. I understand that failure to disclose the provision of material assistance to an organization identified on the U.S. Department of State Terrorist Exclusion List, or knowingly making false statements regarding material assistance to such an organization is a felony of the fifth degree. I understand that any answer of "yes" to any question, or the failure to answer "no" to any question on this declaration shall serve as a disclosure that material assistance to an organization identified on the U.S. Department of State Terrorist Exclusion List has been provided by myself or my organization. If I am signing this on behalf of a company, business or organization, I hereby acknowledge that I have the authority to make this certification on behalf of the company, business or organization referenced on page 1 of this declaration.

APPLICANT SIGNATURE	DATE
X	4/18/2012

ATTACHMENT NO. 3

VENDOR INFORMATION FORM

All parts of the form must be completed by the vendor. Incomplete forms will be returned. The information must be legible. Ensure this is the latest version of the form at www.ohioshareddservices.ohio.gov.

SECTION 1 – PLEASE SPECIFY TYPE OF ACTION

☐ NEW (W-9 OR W-9/CLA FORM ATTACHED) ☐ CHANGE OF CONTACT PERSON/INFORMATION

☐ ADDITIONAL ADDRESS – (A COPY OF AN INVOICE OR A LETTER INCLUDING THE ADDRESS IS REQUIRED)

☐ CHANGE OF ADDRESS – (PLEASE PROVIDE OLD ADDRESS BELOW OR ATTACH LETTER)

ADDRESS TO BE INACTIVATED:

☐ CHANGE OF TIN (W-9 & LETTER OF CLARIFICATION OF CHANGE, WHICH INCLUDES NEW & OLD TIN IS REQUIRED)

☐ CHANGE OF NAME (W-9 & LETTER OF CLARIFICATION OF CHANGE, MUST INCLUDES NEW & OLD NAME IS REQUIRED)

☐ CHANGE OF PAY TERMS ☐ CHANGE OF PO DISPATCH METHOD ☐ OTHER _____

SECTION 2 – PLEASE PROVIDE VENDOR INFORMATION

LEGAL BUSINESS OR INDIVIDUAL NAME: (MUST MATCH W-9 OR W-9/CLA Form)
WILES, BOYLE, BURKHOLDER & BRINGARDNER CO., LPA

BUSINESS NAME, TRADE NAME, DOING BUSINESS AS (IF DIFFERENT THAN ABOVE)

FEDERAL EMPLOYER ID (FEIN) OR SOCIAL SECURITY NUMBER (Used [redacted]

SECTION 3 – PLEASE PROVIDE COMPLETE ADDRESS

ADDRESS:		COUNTY:
300 SPRUCE ST		FRANKLIN
CITY:	STATE:	ZIP CODE:
COLUMBUS	OH	43215

SECTION 4 – ADDITIONAL ADDRESS (IF MORE THAN 1 ADDRESS, PLEASE INCLUDE A SEPARATE SHEET)

ADDRESS:		COUNTY:
CITY:	STATE:	ZIP CODE:

0894 5637 REV. 11/1/2011

SECTION 5 – CONTACT INFORMATION & PERSON TO RECEIVE PURCHASE ORDER

NAME: ROBERT E. W. SANDER

WEBSITE: WWW.WILESLAW.COM

PHONE: 614 221-5216 | FAX: 614 221-3692 | EMAIL: RSANDER@WILESLAW.COM

PREFERRED METHOD OF BEING CONTACTED: (CHECK ONE) ☐ PHONE ☒ EMAIL

SECTION 6 – INDIVIDUAL TO RECEIVE EMAIL NOTICE OF RFI EVENTS - A USER ID & PASSWORD WILL BE SENT TO THE EMAIL ADDRESS BELOW

NAME: ROB SANDER

EMAIL: RSANDER@WILESLAW.COM | PHONE: 614 221-5216

TO ADD AN ADDITIONAL OR REPLACE A STRATEGIC SOURCING CONTACT PERSON

☒ ADDITIONAL CONTACT PERSON ☐ REPLACE CONTACT PERSON (WILL BE MARKED INACTIVE)

NAME: NEIL SANDER

EMAIL: NSANDER@WILESLAW.COM | PHONE: 614-221-5216

SECTION 7 – PAYMENT TERMS (PLEASE CHECK ONE – IF NONE IS SELECTED THEN NET 30 WILL APPLY)

☐ 2/10 NET 30 ☒ NET 30 ☐ NET 45 ☐ NET 60 ☐ NET 90

SECTION 8 – PURCHASE ORDER DISTRIBUTION – OTHER THAN USPS MAIL

EMAIL OR FAX: EMAIL

SECTION 9 – PLEASE SIGN & DATE

PRINT NAME: Robert E.W. Sander

SIGNATURE: (TYPED SIGNATURES NOT ACCEPTED AT THIS TIME) | DATE: 4/18/2012

SECTION 10 – STATE OF OHIO AGENCY CONTACT (AGENCY USER RECEIVING PAYMENT FROM)

AGENCY CONTACT NAME/EMAIL/PHONE:

COMMENTS:

Note: This document contains sensitive information. Sending via non-secure channels, including e-mail and fax can be a potential security risk

SUBMIT FORM TO:

Mail: Ohio Shared Services
Attn: Vendor Maintenance
P.O. Box 182880 Columbus, OH 43218-2880

Email: vendor@ohio.gov

Fax: 1 (614) 466-1282

QUESTIONS? PLEASE CONTACT:

Phone: 1-877-OH-OSSI (1-877-644-6774)
1 (614) 466-4761

Website: www.ohiochoose.biz/vendor

Email: vendor@ohio.gov

OSM-5657

REV. 11/1/2011

Form **W-9** (Rev. December 2011)
Department of the Treasury
Internal Revenue Service

Request for Taxpayer Identification Number and Certification

Give Form to the requester. Do not send to the IRS.

Print or type
See Specific Instructions on page 3.

Wiles, Boyle, Burkholder & Bringardner Co. LPA

Business name/disregarded entity name, if different from above

Wiles, Boyle, Burkholder & Bringardner Co., LPA

Check appropriate box for federal tax classification:
☐ Individual/sole proprietor ☑ C Corporation ☐ S Corporation ☐ Partnership ☐ Trust/estate

☐ Limited liability company. Enter the tax classification (C=C corporation, S=S corporation, P=partnership) ▶

☐ Exempt payee

☐ Other (see instructions) ▶

Address (number, street, and apt. or suite no.)
100 Spruce St

Requester's name and address (optional)

City, state, and ZIP code
Columbus, Ohio 43215

List account number(s) here (optional)

Part I Taxpayer Identification Number (TIN)

Enter your TIN in the appropriate box. The TIN provided must match the name given on the "Name" line to avoid backup withholding. For individuals, this is your social security number (SSN). However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 3. For other entities, it is your employer identification number (EIN). If you do not have a number, see How to get a TIN on page 3.

Social security number: ___ - ___ - ____

Note. If the account is in more than one name, see the chart on page 4 for guidelines on whose number to enter.

Employer identification number: [redacted]

Part II Certification

Under penalties of perjury, I certify that:

1. The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), and
2. I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding, and
3. I am a U.S. citizen or other U.S. person (defined below).

Certification instructions. You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the certification, but you must provide your correct TIN. See the instructions on page 4.

Sign Here | Signature of U.S. person ▶ [redacted] Date ▶ 4/18/12

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Purpose of Form

A person who is required to file an information return with the IRS must obtain your correct taxpayer identification number (TIN) to report, for example, income paid to you, real estate transactions, mortgage interest you paid, acquisition or abandonment of secured property, cancellation of debt, or contributions you made to an IRA.

Use Form W-9 only if you are a U.S. person (including a resident alien), to provide your correct TIN to the person requesting it (the requester) and, when applicable, to:

1. Certify that the TIN you are giving is correct (or you are waiting for a number to be issued),
2. Certify that you are not subject to backup withholding, or
3. Claim exemption from backup withholding if you are a U.S. exempt payee. If applicable, you are also certifying that as a U.S. person, your allocable share of any partnership income from a U.S. trade or business is not subject to the withholding tax on foreign partners' share of effectively connected income.

Note. If a requester gives you a form other than Form W-9 to request your TIN, you must use the requester's form if it is substantially similar to this Form W-9.

Definition of a U.S. person. For federal tax purposes, you are considered a U.S. person if you are:

- An individual who is a U.S. citizen or U.S. resident alien,
- A partnership, corporation, company, or association created or organized in the United States or under the laws of the United States,
- An estate (other than a foreign estate), or
- A domestic trust (as defined in Regulations section 301.7701-7).

Special rules for partnerships. Partnerships that conduct a trade or business in the United States are generally required to pay a withholding tax on any foreign partners' share of income from such business. Further, in certain cases where a Form W-9 has not been received, a partnership is required to presume that a partner is a foreign person, and pay the withholding tax. Therefore, if you are a U.S. person that is a partner in a partnership conducting a trade or business in the United States, provide Form W-9 to the partnership to establish your U.S. status and avoid withholding on your share of partnership income.

ATTACHMENT NO. 4

[Letterhead of Mike DeWine
Ohio Attorney General]

DEMOGRAPHICS

Attorney Name
Firm Name

Please provide our office with information on the composition of your staff. Please include totals for all employees, partners, associates, of counsel, shareholders and members.

	Nationwide	Ohio only
Total Number of Employees	61	61
Total Number of Women	34	34
% of Women Employees	5500%	5500%
Total Number of Minorities	3	3
% of Minority Employees	5%	5%

Is your firm minority owned? Yes ❑ No ☒

Is your firm female owned? Yes ❑ No ☒

ATTACHMENT NO. 5

Ohio | Bureau of Workers' Compensation

30 W. Spring St.
Columbus, OH 43215

Certificate of Premium Payment

This certifies the employer listed below has paid into the Ohio State Insurance Fund as required by law. Therefore, the employer is entitled to the rights and benefits of the fund for the period specified. For more information, call 1-800-OHIOBWC.

This certificate must be conspicuously posted.

Policy No. and Employer	Period Specified Below
249105	01/01/2012 Thru 05/31/2012

WILES BOYLE B[illegible]HOLDER [illegible]NGARDNER CO
300 SPRUCE S[illegible]
COLUMBUS, O[illegible]

ohiobwc.com

[illegible]

You can reproduce this certificate as needed.

Ohio Bureau of Workers' Compensation

Required Posting

Effective Oct. 13, 2004, Section 4123.54 of the Ohio Revised Code requires notice of rebuttable presumption. Rebuttable presumption means an employee may dispute or prove untrue the presumption (or belief) that alcohol or a controlled substance not prescribed by the employee's physician is the proximate cause (main reason) of the work-related injury.

The burden of proof is on the employee to prove the presence of alcohol or a controlled substance was not the proximate cause of the work-related injury. An employee who tests positive or refuses to submit to chemical testing may be disqualified for compensation and benefits under the Workers' Compensation Act.

Ohio | Bureau of Workers' Compensation

You must post this language with the certificate of premium payment.

[illegible]

ATTACHMENT NO. 6

[Letterhead of Ohio
Department of Administrative Services]

4/16/2012

Michael Close
Wiles Boyle Burkholder & Bringardner Co, LPA
300 Spruce St
Columbus, OH 43215

Dear Michael Close:

SUBJECT: Affirmative Action Program Verification
Effective Dates: 04/16/2012 through 04/15/2013

As you are aware, a company desiring to participate in the State of Ohio procurement process must demonstrate to this Office that the company has complied with all applicable federal and state affirmative action programs for at least the last year.

After careful review of the affirmative action documentation you provided to this office, the Equal Opportunity Division of the Ohio Department of Administrative Services has determined that Wiles Boyle Burkholder & Bringardner Co, LPA satisfactorily meets the requirements set forth in Section 125.111(B) of the Ohio Revised Code as is required for participation in the State of Ohio procurement process. This letter shall serve as the state's official certification to this effect.

Please note that the Equal Opportunity Division may conduct an audit of the Wiles Boyle Burkholder & Bringardner Co, LPA's affirmative action program to

determine the company's continued compliance with Section 125.111 of the Ohio Revised Code.

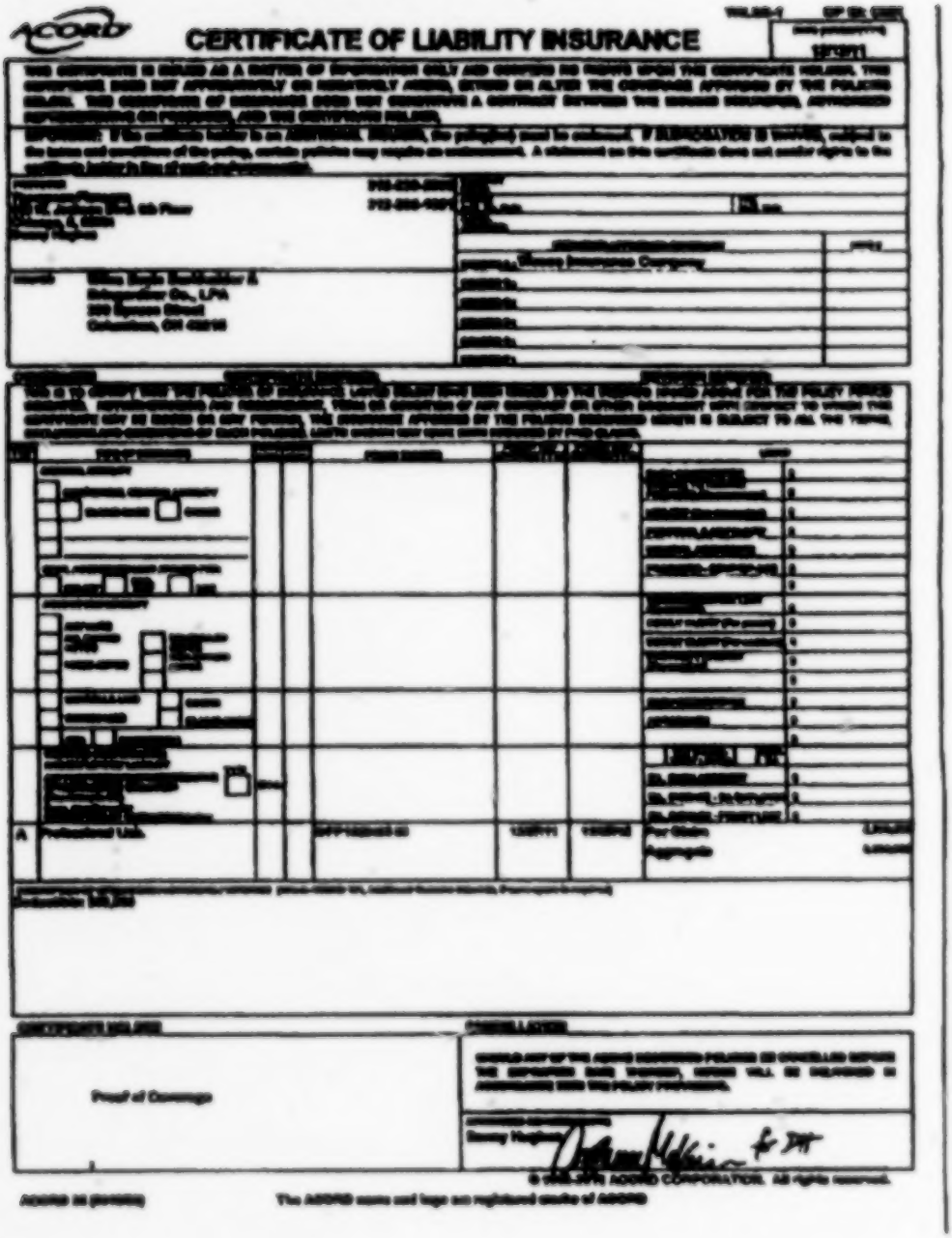
As the Affirmative Action Program Verification indicates, the State of Ohio values diversity among its business partners and their employees, and hopes to see them grow and prosper. Consequently, we are delighted to be able to assist your company by approving your affirmative action program efforts. If you need any assistance or have questions about the Affirmative Action Program Verification, its objectives or its operation, please contact the Equal Opportunity Division's Construction Compliance Unit at 614.466.8380.

Sincerely,

/s/ Richard M. Scott

Richard M. Scott
State EEO Coordinator
Ohio Department of Administrative Services

ATTACHMENT NO. 7



ACORD

CERTIFICATE OF LIABILITY INSURANCE

Proof of Coverage

ATTACHMENT NO. 8

[Letterhead of Mike DeWine
Ohio Attorney General]

Certifications

1. I certify that all Wiles Boyle Burkholder & Bringardner Co, LPA, attorneys who will bill for any Ohio Attorney General assigned matter are members in good standing with the Ohio Bar and/or with other state bars to which they have been admitted to practice and have not been disqualified from the practice of law in any other jurisdiction or forum.

/s/ Michael Close	5/1/2012
Signature	Date

Michael L. Close
Printed Name

2. I certify that neither Firm Name nor any of its proposed team members for any Ohio Attorney General assigned matters are, at this time, unable to represent the Office of the Ohio Attorney General due to a disqualification under O.R.C. § 3517.13 (campaign contributions).

/s/ Michael Close	5/1/2012
Signature	Date

3. **PLEASE CERTIFY TO EITHER SECTION A OR SECTION B BELOW:**

A. I certify that no legal malpractice actions are pending or have been adversely decided against me or my law firm within the last five years. I further certify that there have been no judgments, material or otherwise, against me or Firm Name in the past five (5) years nor are there any unresolved findings pursuant to O.R.C. § 9.24 (finding for recovery). There have been no citations or liens from any federal, state or local agency against me or my firm in the past five (5) years.

/s/ Michael Close	5/1/2012
Signature	Date

B. I certify that, to my knowledge, the following are the only actions pending or adversely decided against me and/or my law firm within the last five years:

*See attached memo of explanation.

_____	5/1/2012
Signature	Date

ATTACHMENT NO. 9

CURRICULUM VITAE OF MARK J. SHERIFF

Mark J. Sheriff is the Chairman of the Collection Department for Wiles, Boyle, Burkholder & Bringardner Co., LPA, Columbus, Ohio and has specialized in the area of collections for more than 30 years. He is a graduate of Ohio State University and earned his J.D. degree from the University of Cincinnati College of Law, with honors, where he was also Order of the Coif as well as Research and Survey Editor for the Law Review. He is past President of the Commercial Law League of America and is currently the Treasurer of the Creditors Rights Section of the Commercial Law League and also serves on the League's Finance Committee as well as several other committees. Additionally, he previously served as an Advisor to the National Conference of Commissioners of Uniform State Law with respect to revision of Article 2 of the U.C.C. He is currently certified as a Creditor's Rights Specialist by the American Board of Certification and also serves on both the Board and Executive Council of that organization. He is a member of the Columbus Bar Association, The Ohio State Bar Association, The District of Columbia Bar Association, The American Bar Association and The American Association for Justice previously known as The American Trial Lawyers Association. He is an active member of the Banking, Commercial Law and Bankruptcy Committee of the Ohio State Bar Association. He is also a Charter Member of the Ohio Creditor Attorney Association. He has a AV rating in Martindale-Hubbell and has also been recognized by last three years by Ohio Super Lawyers Magazine as a

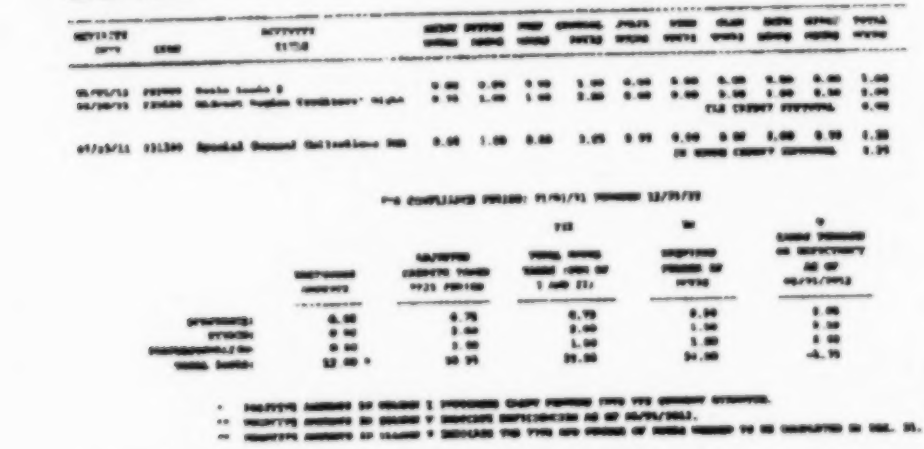
Business Litigator. He is a frequent speaker and has presented programs at the National Meeting of the American Bar Association, The National Association of Credit Managers (NACM) and the NCBJ as well as the Commercial Law League of America. Mr. Sheriff practices in the areas of commercial law; business, civil and corporate litigation, commercial and retail collections; personal and financial counseling and planning.

Additionally, Mr. Sheriff was previously the Chairman of the Collection Department for the law firm of Luper, Sheriff & Neidenthal from 1974 through 2002 before his affiliation with Wiles, Boyle, Burkholder & Bringardner Co., LPA in August 2002. He served on the Upper Arlington Board of Education from 1984 – 2000 and was President or Vice President eight out of the sixteen years he served. He served in the United States Army from 1971 through 1973 and was honorably discharged with the rank of Captain.

My Information | Modify Information | Register Online | CLE Transcript | Change Password | Contacts | LOGOUT

| Add / Edit Course Hours | CLE Requirements | Print Transcript | Instructions |

Select Biennium: 2013



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Accept Final Transcript - Once you are satisfied that your Final Transcript is complete, please select Accept Final Transcript and follow the prompts. This will fulfill your obligation to file a Final Reporting Transcript by January 31 of your Reporting Year. To be deemed timely, your electronically filed Final Reporting Transcript must be submitted on or before 11:59 pm Eastern Time, January 31st of your reporting year.

View Previous Transcripts - You can also view your past biennial reporting periods by selecting the appropriate reporting period in the drop down menu. Records for past reporting periods are complete and official. Credit cannot be added to a closed biennium.

View New Lawyers Training Record - You can also view your New Lawyers Training transcript by selecting the appropriate choice in the drop down menu.

Print Transcript - A printer-friendly copy of your transcript is available by clicking on the "Print

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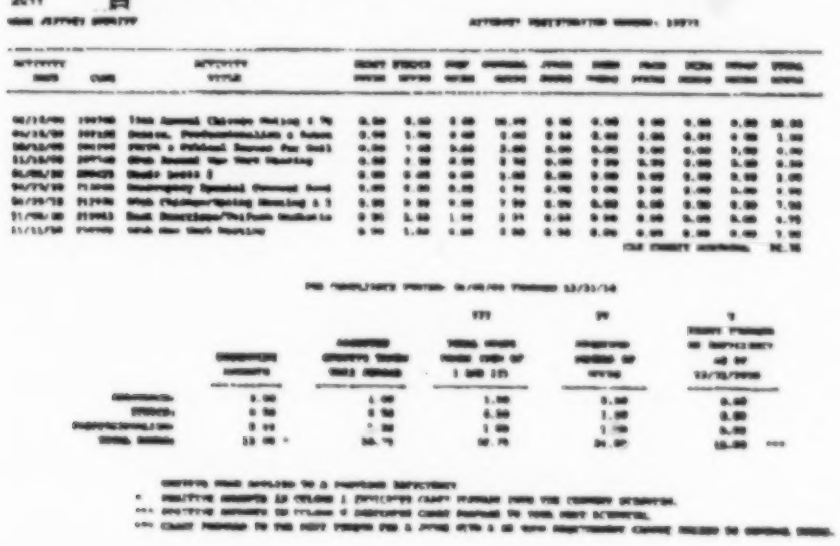
For more information about Continuing Legal Education in Ohio and to access lists of approved CLE activities click here.

| | | CLE Requirements | Print Transcript | Instructions | Select Biennium:
2011



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Neil C. Sander

Personal

Neil C. Sander
34 years old
Married, 2 children

Education

Capital University Law School, Columbus, Ohio
Juris Doctorate, 2004

The Ohio State University, Columbus, Ohio
Bachelor of Science in Business Administration from the Max M. Fisher College of Business, 2001
Major: Real Estate and Urban Analysis

Professional Experience

Wiles, Boyle, Burkholder & Bringardner Co., L.P.A.
Columbus, Ohio
Legal firm supported by 28 attorneys specializing in insurance defense, real estate transactions, creditors' rights, litigation and estates and trusts.

Associate Attorney
November 2004 – present
- Lead attorney in firm's Foreclosure/Bankruptcy Department
- Represent a diverse group of clients with an emphasis on creditors' rights, including foreclosure, bankruptcy, litigation and collections.
- Meet with clients to develop and implement trial strategy based on clients' needs and recommendations, consistently obtaining favorable results through settlement or trial.
- Administer and manage numerous claims from inception to conclusion.
- Practice before federal courts, state courts, arbitration and administrative agencies.
- Draft a variety of pleadings including complaints, motions, briefs, discovery documents, legal response, memorandums in opposition, arbitration briefs, judgment entries and settlement agreements.
- Take and defend depositions in civil litigation matters.
- Research a variety of legal issues for clients and author legal advisory memorandums based on the particular situation.

Law Clerk
May 2002 – October 2004
- Drafted numerous legal documents, including contracts, pleadings to be filed with the court, discovery requests and advisory memorandums.
- Assisted in the preparation of trial matters by preparing exhibits, arranging client meetings, and briefing attorneys on trial issues.
- Attended and assisted lead attorneys at numerous fact-finding hearings and trials.
- Conducted copious amounts of research on a variety of legal issues and prepared memorandums for the requesting attorney.

Courier
January – August 2001

- Filed various pleadings and other legal documents with a number of courts in Franklin County, Ohio and the surrounding counties, including real estate transfers.
- Researched issues relating to real estate transfers including title defects, liens and title history.
- Served subpoenas and eviction notices.

Ohio Senate State House, Columbus, Ohio
State Senator Robert E. Latta, 2nd District
Constituent Aide
January – December 2000

- Wrote letters to constituents in the 2nd District of Ohio in response to concerns expressed.
- Advised constituents calling with questions and/or concerns regarding Ohio state government and pending legislation.
- Researched topics and issues to assist the State Senator Latta in serving his district.

Licensure/Certification

- Member of the Bar, State of Ohio; admitted 2004
- United States District Court, Southern District of Ohio 2005
- United States District Court, Northern District of Ohio 2006
- Title Insurance Agent in Ohio 2009

Community and Professional Involvement (past and present)

- Mortgage Bankers Association
- American Legal and Financial Network
- American Bar Association
- Ohio State Bar Association
- Columbus Bar Association
- Assistant Varsity Hockey Coach, Thomas Worthington High School

Print

| | CLE Requirements | Transcript | Instructions | Select Biennium:

2011

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| Add / Edit Course Hours | CLE Requirements | Print Transcript | Instructions |

Select Biennium: 2013

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Transcript* Print

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EXHIBIT NO. 4

Gregory L. Coburn
987 Cassingham Rd. So.
Bexley, OH 43209
614/231-8099

Experience:

April 1987 - Present: Mark Sheriff, Attorney at Law lateral transfer to Wiles, Boyle, Burkholder & Bringardner as a Commercial and Retail Litigation Paralegal

I am responsible for pre/post-judgment collections, work with staff coordinating the timing of advising the client of the status of the case and to make recommendations regarding the filing of the suit if warranted.

Other responsibilities include, communicating and negotiating with the debtor after suit and then follow-up making sure the claim is reduced to judgment. Work with the courts and instruct on the filing of post-judgment remedies. Drafting settlement agreements, complaints, proofs of claims and a variety of other documents.

I work with forwarding attorneys and collection agencies and keep client apprised of our progress with the files on an ongoing basis. Supervise staff in the decision-making process of how to handle activities such as amendments to pleadings and executions, bank and wage attachments. Make sure court docket is covered and witnesses are prepared for trial

Work with a Commercial/Retail Legal Software Data Base which includes EDI transfer of claims from other attorney and collection agency data bases.

1985-1987: Credit Union collections and portfolio rehabilitation. I have strong real estate lending background, served on Credit Committee and made recommendations to set lending policies.

1978-1985: Marshall and St. Clair Attorneys - Retail and Commercial Collections. *(See 1987 to Present for responsibilities and qualifications.)*

Prior Years: I also have a number of years experience in small financial institution lending.

Legal Knowledge:	I have extensive experience with The Fair Debt Collection Practices Act, the Fair Credit Reporting Act, The Uniform Commercial Code, Regulation E, The Privacy Act, Federal and State Exemption Laws, Bankruptcy Law (Chapters 7, 11 and 13), Real Estate Law, Domestic Relations Law and Rules of Civil Procedure on both the state and local court rules level. Subrogation is also a strong part of legal and collection skills as well as probate experience.
Basic Knowledge:	I know how to utilize the abundance of resources that are available by credit reporting agencies and have developed other investigative techniques with Internet and outside related resources. Vast experience in sub-prime loans, small lending institutions, commercial collections and foreclosures. Client development through The Commercial Law League of America, National Association of Retail Collectors and direct placement of claims.
Education:	High School Diploma-Huntington East High School, Huntington, WV Associate Degree in Business-Marshall University Studies include Business Law, Real Estate Law and Banking Law.

Alicia E. Zambelli, Esq.

5075 Highland Lakes Avenue, Westerville, Ohio 43082 (614) 558-6608
aliciazambelli@hotmail.com

Education

The Ohio State University Moritz College of Law, Columbus, OH
J.D., *Cum Laude* 2007

University of Pittsburgh School of Law, Pittsburgh, PA
Attended for 1L before transferring to The Ohio State University Moritz College of Law

Cornell University School of Hotel Administration, Ithaca, NY
B.S. in Hotel Management 2001

Work Experience

Wiles, Boyle, Burkholder, & Bringardner, Co., L.P.A., Columbus, OH
Associate 11/07 – Present
Law Clerk 10/05 – 11/07

Private general corporate and commercial litigation practice specializing primarily in real estate and construction. Practice includes representation of home builders, homeowners'/condominium owners' associations, small and large closely-held businesses including a significant number of restaurants. Transactional work includes commercial leasing, construction contracts, mechanic's lien work, trademark, liquor permit work and general corporate transactions.

Doubletree Guest Suites, Columbus, OH
Sales Manager 10/03-8/04

Handle sales of hotel rooms and space to clients at a 196 suite hotel. Perform frequent outside sales calls to new and existing accounts. Prepare and negotiate sales contracts. Serve as clients' primary contact and coordinate groups' stay at property.

Adam's Mark Hotel (now the Columbus, a Renaissance hotel) Columbus, OH
Sales Manager 12/02-10/03

Handle sales of hotel rooms and space to clients at a 196 suite hotel. Perform frequent outside sales calls to new and existing accounts. Prepare and negotiate sales contracts. Serve as clients' primary contact and coordinate groups' stay at property.

Other

-Admitted to Ohio, Southern District of Ohio, and Northern District of Ohio
-Member and legal counsel for the Building Industry Association of Central Ohio 2007-2011; frequent author of Legal Outlook for the B.I.A. Builder Update Magazine

Alicia E. Zambelli

1) Detailed Description of your collection experience

Alicia handled all aspects of HOA/COA collections litigation from November 2008 to present; State of Ohio and commercial collections litigation from November 2007 to present

2) Approximate years of collection law experience

4 yrs.

3) Approximate percent of your practice related to collection matters

10%

4) Approximate percent of your practice in State Court and approximate percent in Federal Court

100% in state court

5) Registration number. Each state and federal bar you are admitted to practice; courts you are actively practicing.

0082209; Ohio, Southern District of Ohio, Northern District of Ohio; actively practicing in Ohio state court

6) CLE Seminars, Title, location, date and hours

6/21/11 Landlord Tenant Law, Columbus, OH 2.0 CLE/6.0 teaching

9/9/11 Masters in Trial on Jury Persuasion, Columbus, OH 6.75

9/27/11 Boot Camp: Foreclosure & Loss Workouts, Columbus, OH 6.0

12/13/11 Trials of the Century, Columbus, OH 6.0

BRANDON L. ABSHIER
6635 Pastland Road
Worthington, OH 43085
614-546-9104
babshier@wileslaw.com

EDUCATION:

Capital University Law School, Columbus, OH (2008)
Juris Doctor, cum laude

North Carolina State University, Raleigh, NC (2004)
B.S. in Business Management with a concentration in Finance, cum laude

WORK EXPERIENCE:

Associate Attorney
Wiles, Boyle, Burkholder & Bringardner Co., L.P.A., Columbus, OH
(October 2008-Present)
Practice area includes litigation and collections;
Extensive experience in motor carrier and aviation law.

Law Clerk
Wiles, Boyle, Burkholder & Bringardner Co., L.P.A., Columbus, OH
(April 2007-October 2008)

ASSOCIATIONS:

Columbus Bar Association
Ohio State Bar Association
Transportation Lawyers Association

PUBLICATIONS:

FMCSA's New Texting Ban: Serves as a Reminder to Ensure Company Manuals are Up to Date.
The Transportation Lawyer Magazine, December 2010, Volume 12, Number 3

Branden L. Abshier

1) Detailed Description of your collection experience

Over ten bench trials regarding collections. Also involved in motion practice and settlement of cases

2) Approximate years of collection law experience

3.5 years of collections experience

3) Approximate percent of your practice related to collection matters

5-10 percent of practice related to collections.

4) Approximate percent of your practice in State Court and approximate percent in Federal Court

80% of practice in state court, 20 % in federal court.

5) Registration number. Each state and federal bar you are admitted to practice; courts you are actively practicing.

OH #0083505. Also licensed in U.S. district Court for Southern District of Ohio

6) CLE:

TIDA Annual Industry Seminar October 2010, 7 hours

Basic Lexis Legal Research, January 2011, 1 hour

Transportation Lawyers Association 2011 Regional Seminar, January 2011, 7 hours

TIDA Annual Seminar, October 2011, 7 hours.

Ethics, Professionalism & Substance Abuse, July 2011 2.50

Masters in Trial on Jury Persuasion, September 2011, 6.75 hours

Molly Gwin
2271 Hedgerow Rd. Apt. A . . . Columbus, Ohio 43220 . . . (614)-284-7803 . mgwin@wileslaw.com

Education

The Ohio State University, Moritz College of Law, Columbus, Ohio
Class Rank: Top 35%, Cumulative GPA, 88.0%
- Robert D. Horowitz, Community Services Scholarship
- Sanders Mestel Scholarship
- The Herman Competition

Miami University, Oxford, Ohio
B.A. *cum laude*, May 2008
Cumulative GPA 3.7
Majors: English Literature, Mass Communication
- Dean's List
- Magna cum laude Society
- Alpha of Delta Zeta Academics Chairperson
- Activities:
  Top 5% performer among paid telecommunications representatives charged with cold calling to solicit donations from alumni, parents, and students.

Work Experience

Wiles, Boyle, Burkholder & Bringardner, Columbus Ohio — February 2010 – present
Attorney
• Conduct research and draft documents for 28-member firm specializing in the areas of real estate, litigation, general business, and collections.

Crabbe, Brown & James, Columbus, Ohio — May 2009 – January 2010
Law Clerk
• Conduct research and draft documents for 24-member firm specializing in the areas of insurance defense, litigation, general business, real estate, and probate law.

Stark County Prosecutor's Office, Canton, OH — Summers 2006-2008
•Victim advocate
• Provided information on financial and emotional support to victims of crime in three municipalities as well as Stark County Common Pleas Court.

Business Experience

McDonalds Corporation, Canton, OH Summer 2005
Public Relations Intern
• Coordinated a program through 10 parochial schools involving students selling gift certificates in which they shared profits with McDonalds Corporation.
• Conducted Market Research through mystery shops at 17 McDonalds restaurants

Interests

Have completed course work for real estate salesperson license; big brothers, big sisters, tennis, running, and reading.

Molly R. Gwin

1) Detailed Description of your collection experience

Collections litigation including but not limited to drafting pleadings, serving discovery, negotiating settlements.

2) Approximate years of collection law experience

November 2011- present (.5 years)

3) Approximate percent of your practice related to collection matters

approximately 75%

4) Approximate percent of your practice in State Court and approximate percent in Federal Court

95% state court

5) Registration number. Each state and federal bar you are admitted to practice; courts you are actively practicing.

Attorney Number: 0088189
Admitted State of Ohio

6) CLE:

Lawyer to Lawyer Mentoring Program (Mentor Mike Close)

MARK GLUMAC

EDUCATION

The Ohio State University, Moritz College of Law — Columbus, OH

- Juris Doctor, *Cum Laude*, May 2011
- Grades – 92.1 Average; Top 15% of Class; 3.64 GPA
  - CALI Awards – Insurance Law and Interprofessional Patient-Client Case
- *Entrepreneurial Business Law Journal*, Associate Editor, 2009-2011
  - Published Article - *The Employee Free Choice Act: The Effect of Compulsory Interest Arbitration on Entrepreneurs*, 3 Entrepren. Bus. L.J. 177 (2010).
- Barton Memorial Scholarship and Academic Merit Scholarship Recipient
- Secretary of Administration, Sports and Entertainment Law Association, 2009-2011
- Studied abroad at The University of Oxford, England, Summer 2009

The Ohio State University — Columbus, OH

Bachelor of Arts in Arts and Sciences, *Cum Laude*, August 2007

- Major: Political Science
- Studied abroad at The University of New South Wales, Australia

Tulane University — New Orleans, LA

- Attended from August 2003 – May 2004

WORK EXPERIENCE

Wiles, Boyle, Burkholder, & Bringardner, LPA — Columbus, OH 2011 - Present

Associate Attorney

Bar Admissions – Ohio 2011, United States District Court Southern District of Ohio 2011, Florida (pending swearing in)

Practice Areas – Litigation, Debtor-Creditor Law, Real Estate

Handle all aspects of litigation on behalf of various clients, from initial client meetings through trial.

Wiles, Boyle, Burkholder, & Bringardner, LPA — Columbus, OH 2010-2011

Law Clerk

Drafted pleadings, prepared memoranda, conducted research, and attended hearings

The Ohio Supreme Court — Columbus, OH Spring 10

Judicial Extern for Justice O'Connor

- Wrote Jurisdictional Memoranda and participated in writing opinions

The Ohio State University Moritz College of Law — Columbus, OH Summer 09

PEW Absentee/Early Voting Project

Research Assistant for Professor Daniel Tokaji

Compiled a database of early and absentee voting laws for all 50 States effective during each general election from 1972-2008

INTERESTS

Golf, International Travel, Cooking, Softball, Reading, and Running

Mark A. Glumac

1) Detailed Description of your collection experience

Mark began doing collections work as a law clerk a little over two years ago. Since being sworn in in November 2011 he has been heavily involved in all aspects of litigating collections files from mediation to damages hearings and bench trials.

2) Approximate years of collection law experience

1/2 Year as attorney; 2 Total

3) Approximate percent of your practice related to collection matters

75% collections work

4) Approximate percent of your practice in State Court and approximate percent in Federal Court

90 % state court 10% federal

5) Registration number. Each state and federal bar you are admitted to practice; courts you are actively practicing.

OH 0087775 - Ohio, US District Court for Southern District of Ohio, Florida (pending swearing in)

6) No CLE Seminars. Participant in Lawyer to Lawyer Mentoring CLE substitute

ATTACHMENT NO. 10

Disaster Recovery Plan

Wiles, Boyle, Burkholder & Bringardner Co., L.P.A.

[REDACTED]

L. Your Disaster Recovery Plan

[REDACTED]

Doc. 48-13 **EXHIBIT D**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 2:12-CV-1053
COLUMBUS, OHIO
JANUARY 30, 2013

STATE OF OHIO,

PLAINTIFF,

VS.

NOBILE & THOMPSON COMPANY, LPA,

DEFENDANT.

TRANSCRIPT OF MOTION FOR A TEMPORARY RESTRAINING ORDER HEARING
BEFORE THE HONORABLE GREGORY L. FROST
UNITED STATES DISTRICT JUDGE

APPEARANCES OF COUNSEL:

FOR THE PLAINTIFF:
SHERRY M. PHILLIPS, ESQUIRE
RANDALL M. KNUTTI, ESQUIRE
CHRISTOPHER P. CONOMY, ESQUIRE

FOR THE DEFENDANT:
ERIC E. WILLISON, ESQUIRE
MICHAEL B. ZIEG, ESQUIRE
JAMES E. NOBILE, ESQUIRE

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[2] Wednesday Morning Session
January 30, 2013
9;00 a.m.

IN OPEN COURT:

THE COURT: Mr. Miller, will you call the case, please?

COURTROOM DEPUTY CLERK: Case Number C-2-12-1053, the State of Ohio versus Nobile & Thompson Company, LPA.

THE COURT: Thank you.

Let the record reflect that the State of Ohio, Plaintiff -- you'll have to bear with me today -- I'm sorry -- the State of Ohio, Plaintiffs, are present, being represented by Sherry Phillips --

MS. PHILLIPS: Yes, Your Honor.

THE COURT: -- Randall Knutti, and Christopher Conomy.

MR. KNUTTI: Yes, Your Honor.

THE COURT: The Nobile & Thompson defendants are present, being represented by Mr. Willison --

MR. WILLISON: Yes, Your Honor.

THE COURT: -- Mr. Zieg --

MR. WILLISON: -- and Mr. Nobile.

MR. NOBILE: Good morning, Your Honor.

THE COURT: Today's date is January 30, 2013.

[3] Just for a brief background, I guess, the complaint in this matter was filed in the Franklin County Common Pleas Court asking for declaratory

judgment by the State of Ohio. It was then removed by the defendants to this Court on November 14, 2012.

We conducted among ourselves a 65.1 telephone conference on November 15, 2012. Since then, the parties have filed a joint stipulation of facts. That was Document Number 16. That was filed on January 25, 2013. And then the parties filed their merits hearing brief, or trial briefs, or whatever you want to call it. Those were filed on January 28, 2013. That's Documents 17 and 18. We're here today for the hearing on the temporary restraining order.

Counsel for the Plaintiff State of Ohio, how do you wish to proceed, or how do you intend to proceed?

MS. PHILLIPS: Your Honor, I think none of the parties have any witnesses. Is that correct?

MR. WILLISON: Correct.

MS. PHILLIPS: We had spoken. So I think that the parties are prepared.

THE COURT: In light of the extensive stipulation, I can't imagine what you would have as evidence, but -- or testimony, but that's fine.

So what you're going to do is just oral arguments?

MS. PHILLIPS: Yes, Your Honor. I think that would [4] work for the parties. I would say that I think that we are here on the combined merits, not just --

THE COURT: Yeah. I'm sorry. When I said that -- we are now, that's correct, the combined merits of the entire case.

MS. PHILLIPS: Yes, Your Honor.

THE COURT: That's right.

MS. PHILLIPS: We're here on that.

THE COURT: Thank you.

And I don't know who will be speaking for the defendants, but Mr. Willison, Zieg, or Nobile, do you agree that that's how we should proceed?

MR. NOBILE: We agree, Your Honor.

THE COURT: Good. Thank you.

Then, Ms. Phillips, Mr. Knutti or Mr. Conomy, you may proceed with any oral argument you wish to make at this time. And you've got all day. We had planned on an all-day hearing.

MS. PHILLIPS: Well, Your Honor, I think that that's one of the things I would like to present.

I am Sherry Phillips. I'm here for the State of Ohio, Attorney General Michael DeWine, and I would like to thank your Honor for advancing this cause on the docket. I know that federal courts are busy, and we really greatly appreciate the expedited proceedings that we've been privy to.

The narrow issue before the Court is whether the use [5] of Special Counsel appointed by the Attorney General pursuant to statute violates the Fair Debt Collection Practices Act, the Deceptive Trade Practices Act or the Consumer Sales Practices Act. We believe that the answer is no because Special Counsel are part of the State and the letters accurately depict the relationship between the Attorney General and Special Counsel.

Unlike so many of the parties that are in any of the case law that is before the Court, the Special Counsel

do have the approval and sponsorship of the Attorney General in the use of the logo and letterhead that they are sending their collection letters out on.

Just briefly, I know that Your Honor is probably familiar with the facts; but, if you'll indulge me, I'll go over those facts that we believe to be particularly crucial.

THE COURT: Sure.

MS. PHILLIPS: All state agencies and some local political subdivisions certify debts pursuant to Ohio Revised Code 131.02. First, those debts are collected by in-house resources and collectors, then through third-party vendors, and then ultimately through Special Counsel, who are appointed pursuant to statute. That statute is 109.08.

All collectors use the central computer system of the Attorney General. It's the Columbia Ultimate Business Systems. CUBS is what we call it.

THE COURT: I wasn't aware of that. I actually had [6] to look that up to see what the heck this is all about. But, yeah, go ahead. I wasn't aware that you guys had a computer system that was, at least from your standpoint, or from the pleadings anyway, that sophisticated. But go forward.

MS. PHILLIPS: Well, Your Honor, I would beg to differ with it being sophisticated.

THE COURT: Okay. Maybe it's not.

MS. PHILLIPS: When you look at it, you see a dot matrix screen --

THE COURT: Oh.

MS. PHILLIPS: -- from the -- but through client view, the Special Counsel, at least, get a little bit cleaner screens.

THE COURT: Maybe an abacus would be better, but go ahead.

MS. PHILLIPS: But that is beside the case.

It is very sophisticated. It's been tweaked a lot. It has, basically, though, all documents and all notes. And all of the account details, both from the agencies and from the Special Counsel and from any in-house resources, are loaded into the system and are visible by popping them up.

When anyone has a contact with a debtor -- obviously, not everybody does everything they're supposed to, but they are to log that contact, and so we can see the progress of a particular account and all of the contacts through that one [7] system, in-house and external.

The Special Counsel are defined under Ohio Revised Code 124.11 as being part of the unclassified civil service of the State. And, if you look, that is where Assistant Attorneys General are also appointed, in that same paragraph.

The Special Counsel are trained by the Attorney General's staff. They have seminars, in-house seminars, they have to come to. Sometimes they get CLE on some of the points, but they have internal trainings. They have policies that they are required, and guidelines, that they are required to adhere to.

We share forums, chat forums, discussions. If they have a concern, they can put it out there, you know, as anyone else had a situation like that. And they

also have the resources of the Assistant Attorneys General, who do help them with drafting pleadings, making decisions, negotiations and that sort of thing, familiarizing them, especially if they're new, with the actual debt types.

Also, the Attorney General serves as a conduit between the Special Counsel and the agencies. Occasionally, there is some communication; but, generally, for the most part, the Special Counsel talk to their account representatives. And then they, in turn, the account representatives, communicate with the agencies about the issue. And, that way, when documents are transferred between all those entities, the [8] Attorney General makes sure that everything is documented, both so that, if there is a contact, the Special Counsel will write in there: Contacted client rep, you know, for documents from client, or from agency. Then the client rep, or the Special Counsel rep, would do the same, saying: Sent to agency for documents.

When the documents are received, uploaded onto CUBS, the image is there. And the rep is to make a note: Documents received and forwarded to ... And that's how tied into the system the Special Counsel are.

They've performed -- Special Counsel generally, outside of just collections, perform all manner of special functions made possible only by the special statutory authority that they are granted under 124.11. We put them in our brief, but they have -- these are not powers that could be granted under any contract. They can prosecute crimes. They can defend in the Court of Claims. They can prosecute fraud under Workers Compensation and Medicaid and

Civil Service laws. They can -- they have special authority to collect under 109.08. And, as part of the Attorney General's policies, we do direct -- the Attorney General does direct the use of the letterhead in the collection process.

Debtors are concerned about fraud, in general. And the logo allays their suspicions somewhat because I think that they have seen the letter come in before saying: You owe this [9] debt, and it has the State of Ohio seal both from the agency and then when it's transferred into the in-house process. So then, when they get the letter from Special Counsel, it makes sense to them.

But, frankly, as we put in the stipulations, debtors call all the time: Is this -- you know. Is this right? Is this it? And we have to reassure them that, yes, these people are collecting, and please do go to them for your concerns and work through them, because, of course, the in-house resources would be overwhelmed if we didn't. But if the process doesn't work, then they go back to the in-house resources, and they are their concerns are addressed. Special Counsel are, you know: What's going on? Why are you having this problem? They -- believe me, they contact the Attorney General, so that there is a process for any complaints that is in-house.

The letters are sometimes -- on the letters, you'll see -- as the exemplars in the stipulation show, sometimes the outside -- the Special Counsel -- refer to themselves as outside counsel and sometimes as Special Counsel. Historically, both have been used and have been directed by the Attorneys General. And I think that, the Special Counsel, they try to do whatever the newest Attorney General says; but if

maybe they didn't get the memo or they just continue doing what they've been doing, you know, the changes that go back and forth, I think the current administration believes that [10] "Special Counsel" is more accurate, because it does reflect the statutory phrase, but I do believe, also, that "outside counsel" is something that the lay people understand a little bit better than maybe what is a Special Counsel.

And, so, there is some -- although they are directed to collect according to policies and there are certain things they're not permitted to do, such as to file certain suits without special permission, there is a -- discretion is granted to them as to the number of contacts, how they want to do that, exactly what they say during the communications.

And the other thing is that we believe that the use of the letterhead and the logo helps to inform the debtors that this is a debt of the State. And I know one of the concerns is that this elevates the debt above those of other collection agencies. And that's true. And that is for a good reason: Because, if they ignore these debts, there are some special statutory and policy effects that could come about that are much stronger. For example, their tax refunds can be offset. Any casino or lottery winnings can be snagged. They can lose employment opportunities and/or contracting abilities through some of the other documents. They can lose licenses because both the Department of Education and the Department of Insurance tie the issuance of a license to some of the collection issues that the Attorney General is working on. So, we do want them to know this is a debt of the State and the [11] State remedies may apply.

The Fair Debt Collection Practices Act is intended to stop unscrupulous collectors from pretending to be part of a government agent. In this case, the Special Counsel are not pretending, they're not unscrupulous, and they are authorized to be part of the government. And the standard for misrepresentation is, basically, is it true?

For example, in Smith vs. Transworld Systems, 953 F.2d 1025, the Court held that the name -- the statement "Transworld Systems is a licensed collection agency" did not constitute an attempt to falsely represent that it was affiliated with the State because the statement was true.

In this case, the statement is true. They are Special Counsel to the Attorney General.

The Federal Trade Commission has opined on the least sophisticated consumer standard for determining misrepresentation claims.

I think you know where you're going.

THE COURT: I do.

MS. PHILLIPS: And I have to get --

THE COURT: I forget whose brief it was in. Maybe it was your brief.

MS. PHILLIPS: It was mine, and I was going to repeat it because it's just so true --

THE COURT: That's fine.

[12] MS. PHILLIPS: -- that in the Gammon case Judge Easterbrook mentioned that the least sophisticated consumers actually believe that 12 senators are from other planets.

THE COURT: I think that is true, by the way.

MS. PHILLIPS: That militates toward an objectively reasonable standard, because we could come up with absurd results if we took that to its logical extreme.

Now, one of the cases that has come up is the Gradisher case. And, in Gradisher, the Muskegon County Sheriff had a relationship with some collectors that wasn't quite clear. They allowed them to use that, but they had a contract. The Special Counsel were not appointed to any official position as the Special Counsel are. They just had a contract. But the most important issue is that, in that case, the letterhead of the sheriff was used with no indication of the sender being an outside agency or attorney. And that is distinguishable in this case because the Special Counsel do put their own name. And, even on the envelopes, it's clear that the address that it's coming from is their name and business.

Also, the idea has been floated, not so much in the briefs but in, I think, the letter in August of 2012, that there is a problem in the furnishing of a form that we use to create a false belief in a consumer that a person other than the creditor is participating in the collection effort. And I get the impression that what the argument is is that the [13] Attorney General is not collecting -- is not participating in the collection because it is a state agency or local subdivision, political subdivision, debt and it is being collected by a Special Counsel and, therefore, the Attorney General is falsely saying that it is participating.

Well, for one thing, the Ohio Revised Code requires and/or authorizes the certification of debts to the

Attorney General. And, for other purposes, we've taken the position that, once it is certified to the Attorney General, it is the Attorney General's debt, because you do have to separate out, for conflict-of-interest purposes, some of the decisions of, you know, when are state agencies together and when are they not. However, for general purposes, the State is the State is the State. And that is what the Ohio Department of Human Services versus Ohio Department of Transportation case holds: that you can't -- although the silos are necessary for certain purposes, in general, when any actor of the state is working, it is the state as a whole, and you really should not completely separate those. Now, so, the idea that the Attorney General is not participating in the collection is simply wrong, we would submit.

Now, looking at the Deceptive Trade Practices Act, it is designed to address anti-competitive behavior between commercial actors. It is not a consumer statute. And the Gascho case cited in our brief indicates that -- it addresses [14] commercial injury, not consumer injury. That case -- the Deceptive Trade Practices Act was an allegation against the Special Counsel in the letters from the defendants' firm. And, frankly, it's very difficult to even figure out the logic of that.

Looking at the elements of the Deceptive Trade Practices Act, you see that if you pass off goods or services as those of another, if you cause a likelihood of confusion as to the source, sponsorship, approval or certification of goods or services or if you represent that goods or services have sponsorship or approval when they do not. Well, that is ignoring a whole lot of other points in that law. We've picked out those that

potentially might have some relevance to these proceedings.

First of all, the issue is that there is no likelihood of confusion. Debtors may not know what a Special Counsel is. As we've talked about, it might be better for them to be called outside counsel because the lay person might understand that better, but the letters do accurately state the role of Special Counsel; and, if they were so inclined to look it up, they would find in the Revised Code what a Special Counsel is and what the relationship is right there in 124.11 and 109.08.

Also, there is no relationship or affiliation as stated that the Special Counsel do not have. So, for all the [15] same reasons that are under the FDCPA, it's not a deceptive act. It's our position that it's the same thing under that state law.

Again, the National Football League case makes it clear, although it's in a different context, what one cannot do is that creates a manner -- advertise services in a manner which creates an impression that the services and the holder of the mark exists when such does not -- when no such connection exists. Well, in this case, again, the connection does exist.

Now, looking at the Consumer Sales Practices Act, again, it's not really intended to cover this issue. So we have to strain a little bit to find the ideas in there. But it does say that no supplier shall commit an unfair or deceptive act -- once again, our position is that these statements of this are not deceptive -- and that the subject of a consumer transaction has sponsorship, approval or other benefits that it does not have. And, again, the same basic principles are set forth in the Rice case that we cited in our brief:

that an act is deceptive only if it has the likelihood of inducing in the mind of a consumer a belief which is not in accord with the facts.

We respectfully request that the Court grant a declaration indicating that the use of letterhead by Special Counsel does not violate any provision of the federal Fair Debt Collection Practices Act, Ohio's Deceptive Trade Practices Act, [16] or Ohio's Consumer Sales Practices Act.

Thank you.

THE COURT: Thank you, Ms. Phillips.

Counsel for the defendant, Mr. Willison.

MR. WILLISON: Yes, Your Honor.

THE COURT: You may proceed.

MR. WILLISON: Yes, Your Honor.

THE COURT: And, you know, if you guys want to get back up and reply or -- there is not a problem here. We've got plenty of time, like I said. So don't worry about that.

Mr. Willison, you may proceed.

MR. WILLISON: Good morning, Your Honor. My name is Eric Willison, representing the defendant, Nobile & Thompson, in this matter.

I'm going to be addressing the issue of whether debt collectors are covered under the FDCPA. And with the Court's indulgence, Mr. Nobile will be addressing, if they are debt collectors, what parts of the FDCPA does that conduct violate.

THE COURT: Sure. Got it. That's kind of how you broke down your brief.

MR. WILLISON: Thank you, Your Honor.

The first issue we want to discuss here is what the main issues are, which are, are they debt collectors and what do they violate if they are. To look at that, we need to understand the legislative history of the FDCPA going back to [17] 1977. And we attached these to our trial brief. I found an old dust-covered book in the Franklin County Law Library.

THE COURT: I wondered where you got that.

MR. WILLISON: Yeah. The reference librarian actually told me, she said: Not many people ask for these things anymore.

But I had her going back there, but it talked about this issue of debt collectors gaining an advantage in the process by simulating and pretending to be law enforcement officers.

It's a lot scarier to get a letter from the Franklin County Sheriff's Department or the City of Columbus Police Department or the Ohio Attorney General's Office, because the unsophisticated debtor, when they get that, they think, I could be prosecuted if I don't pay this.

You know, a debtor usually owes more than one debt. You could have, let's say, three debts: one to Visa, and you've got a debt collector trying to collect for that; then you've got one to, say, a Shell credit card, and some other debt collector is trying to collect for that; and then you've got this third debt to, let's say, OSU Hospital. And here comes the State AG's office trying to collect for that and a debt collector using that letterhead.

Now, the debt collector has to make a -- sorry. The debtor has to make a rational decision as to which debts to pay [18] first, and it could be that the Visa debt has an extremely high interest rate. So, if the debtor, with his limited funds, wants to pay that first, that would be a good reason for that. Perhaps the Shell card has a penalty if you don't pay by a certain period. That would make a lot of sense to pay that first, but then along comes this letter from a law enforcement officer. And the implication there is, gee, that these guys could prosecute me if I don't pay this debt. And it skews the thing. It also has the effect of, not only does it remove the ability for the debtor, the least sophisticated debtor, to make the rational decision as to which debts to pay first, it also disadvantages those debt collectors who work for Visa and for Shell, because their debt just now got pushed to the back of the bus. So, all of these are things that the FDCPA was designed to protect against because of the fact that they don't want the other debt collectors who do follow the law to be disadvantaged by the fact that they're following the law and not engaging in this conduct.

Now, when we talk about the FDCPA and its application to the Special Counsel, there is an exception. First of all, the FDCPA only applies to debt collectors, all for except one provision. And there are exceptions to that provision of who is and who isn't a debt collector. And one of the exceptions that's key in this case is whether someone, whether the debt collector, is an employee or an officer of the United States or [19] a state.

Now, in this case, plaintiff does not really say what Special Counsel are. They don't say. They say they're

not an employee, because, in their stipulations, they've stipulated that they're not employees, but they don't say that they're officers. They say they're part of the State of Ohio, they're something, but they don't really say they're officers.

This case come before -- the issues in this case had actually come before this Court before, back in 2008. Judge Marbley actually had a case, the Keefer case. Unfortunately, due to the procedural issues there, he was not able to rule on the case. And I believe it later settled before there was a need for that ruling. But Judge Marbley analyzed the case the same way that the Ohio Ethics Commission did back in 1975 and the same way that the Gradisher court analyzed it and the same way the Brannan and the -- I believe it was Pollice -- I'm not sure if it's Pollice or Police (phonetic) or Polich (phonetic) or whatever, but they all analyzed it the same way. And they said, you're either an employee or an officer, in which case you're not covered by the debt collectors statute; you're not covered as a debt collector; or, over here, you're an independent contractor, and you are.

So, the question, then, is whether these people are independent contractors or whether they're officers of the State of Ohio.

[20] Now, in that ethics opinion from 1975, there was a Special Counsel who was appointed under 109.08, and he was concerned because there is this other statute in the Revised Code, 102.04. And 102.04 deals with the compensation that Special Counsel or any government official can get and how they're paid.

And I believe, in a nutshell, what 102.04 says is, you have to be paid -- if you're an officer, you have to

be paid by the office that you work in. Okay? And, Special Counsel, they don't just do this collection work. They also -- they're just attorneys, you know, working for their firms, and they do a lot of outside work. And this one attorney was concerned because he not only was a Special Counsel trying to collect debts, he was also doing other work for other departments of the State of Ohio and was being paid for them, and he was concerned that he was running afoul of 102.04. So he asked for an ethics opinion from the Ethics Commission.

The Ethics Commission basically told him, well, relax; you're not an officer of the State of Ohio, and here is why: To be an officer, you have to be appointed to a position, that is, either in the -- either set out in the Ohio Constitution or set out in the legislative enactment. And there is no legislative enactment that sets up an office of Special Counsel. So, they said, basically, if we look at your relationship with the State, you look a lot more like an [21] independent contractor.

And then the Ethics Commission went through that 13-factor test that we all heard in law school about whether somebody is an independent contractor or an employee and that sort of thing. And they concluded that Special Counsel appointed under 109.08 are independent contractors for the purposes of having to worry about 102.04 and getting paid by other state agencies. So they said: Don't worry. It's no problem. You can get paid by other agencies and do your work.

Now, the State comes in and says that these people are, somehow, a part of the State of Ohio. It's difficult for me to understand the argument that

they're not independent contractors because, if you look at the contract that they signed with the State of Ohio, the retention agreements for Special Counsel, both the 2011 agreement and the 2012 agreement, both of them, recite -- and the State drafted this language -- both of them recite that Special Counsel are to think of themselves – and they use these exact words -- solely as independent contractors. But then you come in here and you say, well, no, they're part of the State. But yet in the agreements that they sign, they're independent contractors.

They say they're not debt collectors under the FDCPA, but, if you look at the letters that are attached to the stipulations that they send out, the Special Counsel say, we are debt collectors. So they say one thing to the consumer, [22] and then they come in here and say another thing here. Well, they don't. The Special Counsel aren't speaking here. The State is. But the State is saying that the debt collectors are saying one thing to the debtors, but there's something else here. And then they say that none of this causes any confusion. That's just not the case.

The fact that you're appointed -- the fact that you're engaged to work for the State of Ohio to do something for the State of Ohio pursuant to a statute does not make you an officer of the State of Ohio. Every action, every action that the State takes, is pursuant either to the Ohio Constitution or to some legislative enactment or some Ohio Administrative Code enactment or, presumably, a court order. The State doesn't just wing it. So, everything that they do is pursuant to some sort of legislative enactments.

That's a circular argument to come in and say that because 109.08 allows the Attorney General to engage these people that that is somehow definitive as to the issue of whether they're an officer. That is a circular argument.

Secondly, when we talk about this 124.11(a)(11), it does describe Special Counsel as unclassified civil servants, but let's again look at the FDCPA. The FDCPA says you get the exception if you're an employee or an officer. It doesn't say you get the exception if you are a civil servant or an unclassified civil servant.

[23] Further, this statute, 124.11(a)(11), it deals with whether you're classified or unclassified. Those distinctions don't make you an officer. That's not the purpose of that statute. The purpose of that statute is to tell employees whether they have a property right in their job. If you're a classified employee, they can't just say: You're fired. Out. You've got to have a hearing. You've got to have whatever the proceedings are for civil servants. They get protections, so that it's not just an at-will employment. If you're unclassified, they don't have to give you those protections. They say: You're fired. Out you go. That's 124.11(a)(11).

Now, there was some talk about how, well, Special Counsel have all sorts of other powers: They can try cases. They can do this. They can do that.

There are several statutes that allow for the appointing of Special Counsel, but we are here on 109.08, which is the debt collection one. And whatever all these other fellas do under their powers, well, they're not debt collecting. So they're safe from us. I don't think what they have -- the powers that

the other people have, that doesn't really make a difference to your analysis of this case.

Now, there was also some talk about, in the briefs, about the sweeping powers that the Special Counsel have. You know, these powers are so sweeping that they're not allowed to carry business cards that say they're from the Attorney [24] General's Office.

109.08 gives these Special Counsel extremely limited powers. They can collect the debts. They can't do anything else. They're not out there prosecuting crimes and all this sort of thing.

There was also some talk about the control that the A.G. has over the Special Counsel; but, in the stipulations -- and we pointed these out in our brief -- in the stipulations, they talk about how Special Counsel has discretion once the account gets forwarded to them. And discretion is the hallmark of an independent contractor.

If you look at the 13-factor test -- and, again, that Ethics Commission, even though from 1975, goes through that 13-factor test -- and then if you compare that to the evidence and the stipulations, you'll find that Special Counsel use their own offices. They use their own computers. They use their own printers. They don't have company cars. They're 1099 employees. They're not W-2 people. They're 1099s.

For tax purposes, 1099s are used for independent contractors. These people are independent contractors. And under the analysis from Marbley, the Ethics Commission, from Gradisher, from Brannan and Pollice, independent contractors are covered under the FDCPA.

Now, in Gradisher, the State attempts to make a distinction that, oh, well, Gradisher is different because the [25] collector in Gradisher never actually used his own name. But whether he used his own name doesn't make a difference as to whether they are covered under the debt collector statute. That only is a matter of whether or not it's a violation or not.

And, again, Mr. Nobile will deal with what conduct constitutes violations of what part of the FDCPA. But Gradisher found, in the end, these folks were covered. They had signed a contract with the Muskegon County Sheriff's Office and the county to try to collect these -- I believe it was water bills in Gradisher. And the court in Gradisher found it extremely important that the contract between CEU, which was the defendant in Gradisher, and the Muskegon County Sheriff's Department specifically said that CEU was to regard itself as an independent contractor. That court said that's important; that's really important. And, here, in the same -- in the same way, their contracts identify the Special Counsel as independent contractors. In fact, they even use the word "solely."

There is also this issue of, well, they're still, somehow, part of the State of Ohio. If they're part of the State of Ohio, how are they signing contracts with themselves? And the contract isn't just a contract, therefore, with themselves. That contract requires them to indemnify the State of Ohio.

[26] How do you indemnify yourself? More importantly, why do you indemnify yourself? It doesn't make any sense. If I'm going to engage in some risky activity, I don't write a contract up that

night and say: Eric Willison agrees to indemnify Eric Willison if the skydiving thing goes all pear shaped tomorrow. So, it doesn't make any sense for them to indemnify themselves and come in here and claim they're not -- that they're a part of the State of Ohio.

Moving on, Your Honor, to the part about furnishing of deceptive forms, they say in one breath that they're not falsely suggesting anything because they are part of the State of Ohio, but yet Special Counsel puts Special Counsel's law firm's name along with the State of Ohio's name. So they're either falsely suggesting they're with the State of Ohio or they're falsely suggesting they're with the law firm of Eric A. Jones or whatever Special Counsel there is. So, one of these two can't be right.

Lastly, Your Honor, on the CSPA question, I wanted to briefly address that, because we didn't put it in our brief, that the Sixth Circuit has found and actually -- I'm sorry -- not the Sixth Circuit. This Court has found that the FDCPA has been incorporated – the CSPA has incorporated the FDCPA such that a violation of the FDCPA is a violation of the CSPA. So, we can go through all of these, you know, the various ten factors in 1345.02, but there is also 1345.03 and all the case [27] law that supports that. And in all of the factors under 1345.02 they say this is not an exhaustive list. This is just -- these are examples. And then, 1345.03, these are not exhaustive lists. They're factors as to whether something is unconscionable or deceptive. Similarly, in the FDCPA, it says that the following things are violations, but this is just -- this is a list. It's including, but not limited to. There are other things that can be a violation.

One other thing, too. They said that, well, as long as it's true, then they're off the hook. But, in our brief, we talked about -- I believe the case was Gammon vs. GC Services. And they quoted it, too. And, in Gammon, the Court said just because something is literally true does not mean that it's not misleading. And that's a little bit hard to get your head around at first, but then you look at what happened in Gammon.

In Gammon, the debt collector sends out in the letter, and they also say in the letter, well, we used to work with the federal government, specifically the Department of Internal Revenue, and also the tax collection departments for various states. And the Court in Gammon, you know, that's a threat. That's basically saying, you know, we know how -- we've got friends; we can get to you; we know how the game works; and we can use our contacts; and we will get this debt collected, you know, using our contacts with them.

It was literally true that, yes, in the past, Gammon [28] had worked for -- sorry, not Gammon, but GC Services -- had worked for the Internal Revenue Service and for these various state departments of taxation. But they said, even though that's literally true, it's deceptive in a manner that violates the FDCPA.

So, that's our position on whether they're debt collectors or not. And Mr. Nobile will talk a little bit about what parts of the statute that they're violating.

THE COURT: Thank you.

Mr. Nobile, you may proceed.

MR. NOBILE: Your Honor, good morning again. And thank you.

For the record, I am Jim Nobile.

Counsel, good morning, also.

My part of this presentation, Your Honor, deals with whether the FDCPA, itself, has been violated on the assumption that, first of all, Special Counsel are debt collectors. So, we're past that hurdle in our argument. So I will try my best not to rehash some of the arguments.

When you look at the FDCPA -- and we talked about it from an intellectual standpoint -- it's very hard, because we're all lawyers, but the law commands us to view each violation from the viewpoint of a completely different person. And I think, after you go to law school, you would agree with me that you don't think the same. It's a completely different [29] process. I was told that by my first-year torts professor, indicating that, after you leave your first year of law school, you'll never be the same again in the way you view how events and things happen in life. And I think that's true. However, the law says, look at it from the least sophisticated consumer standard. And Ms. Phillips was indicating that that's an objectively reasonable standard. And I agree, but it's not an objectively reasonable standard by a reasonable person. It is an objectively reasonable standard by a least sophisticated consumer.

It occurred to me that maybe I ought to take a little bit further look, Your Honor, at the law and what the Sixth Circuit really means by that. And I'm quoting from a case, a fairly recent case out of the Sixth

Circuit called Miller vs. Javitch, Block and Rathbone. The Court, the Sixth Circuit in this case, basically said, in determining whether a statement qualifies as misleading, it employs an objective least sophisticated consumer standard. And, you know, it protects the naive consumer while preventing liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness and presuming a basic level of understanding.

Your Honor, if I may, can I pull this out?

THE COURT: Sure.

MR. NOBILE: Thank you.

[30] (Mr. Nobile utilizes the ELMO.)

MR. NOBILE: If a consumer gets that, they think they got that from Mike DeWine, the Ohio Attorney General, period. It's the first thing they see. It's prominently set forth on the top. It's on the stationery.

The question becomes: The least sophisticated consumer opens their mail. What do they see? That's what they see. The first thing they're saying is, well, where did that come from? That's coming from Mike DeWine.

Now, they may read along a little bit further, as they're generally supposed to, and they may also see another lawyer who signed it. And that lawyer may even, at some point, list that they're outside counsel or, in some cases, Special Counsel for the Ohio Attorney General's Office. But from the least sophisticated consumer's standpoint, they think they got that from Mike DeWine, period.

Is there anything else to really say about that? Well, if you don't like the severity of that statement, you can say this: At the very minimum, that's confusing. It's confusing. You've got letterhead that's used by Mike DeWine for just about everything else. It's attached to this letter. And strapped to it is another attorney's name that seems to have a completely different payment address and a completely different location to communicate with them.

This is just another version. Again, prominently [31] displayed. The least sophisticated consumer sees this. I got something from the Office of the Ohio Attorney General. Contains another lawyer's name, another lawyer's address. At a very minimum, Your Honor, it's confusing.

So, in looking at what that means, before I get into the actual statute, I looked up another case last night, kind of to get an idea of about what the FDCPA means when something is false, misleading, because we don't like those words. That just sounds like somebody is deliberately coming out there to trick you or do something of that nature. And I think a very strong argument could be made that that's what's really happened here, from a tactical standpoint, to get more money into the coffers for the State of Ohio. But that aside, when I look at it, to -- and this is in the case of Federal Home Loan Mortgage versus Lamar, Your Honor. And this is a 2007 Sixth Circuit decision, 503 F.3d 504.

Now, the Court in this case basically said, whether or not a communication is false, deceptive, or misleading is an inquiry similar to whether a communication is confusing in the eyes of the least

sophisticated consumer. So, against that backdrop, we now look, Your Honor, to the statute itself. And we're reminded in looking through the cannons of statutory interpretation that, in a federal situation, we look at statutes for their plain meaning.

I'm going to work backwards here, Your Honor. I'm [32] going to start with Subsection e(14). The way the FDCPA breaks it out for false and misleading statements or deceptive statements is -- it's all embodied, and all codified, under 1692e, and there is a subset of many different factors. And when you look at it and you start trying to digest and categorize what happens, they break it out into these sections.

And I was reminded by my colleague, Mr. Zieg, that maybe we don't have to interpret so hard on this because, if it fits within one of those laundry list of items, Congress has already said that's prima facie false, misleading, or deceptive; you don't have to determine whether it is; if it fits within that list, it is. It says it's simply a violation of the law.

So, under 1692e(14), a debt collector cannot use any business name, company, organization name other than the true name of the debt collector's business, company, or organization. That's what it says.

Go back to our example. Taking a step back, at a very minimum, it's confusing. There is two different names. Implied within the statute, Your Honor, is that you have one true name. Well, the one true name in this case -- we can't see the name -- is a completely different lawyer who has got a completely different office, yet, Your Honor, he's using letterhead stationery supplied by the Attorney

General to give the impression that there is another party or another name [33] involved. Because he's using another name other than his true name in this case or the company's true name in this case, that's just a straightforward violation. You don't have to decide whether it's deceptive. You don't have to decide whether it's misleading. You don't even really have to decide whether it's confusing. It just is.

That's what they're doing. They're using a name other than their own true name. And the only way to get out of that, as Mr. Willison had already described, is if they're an officer or an employee. We know that they're not an employee, because they've stipulated to that, and we also know from our other analysis that they're not an officer. So, if they're a debt collector, they've violated this section of the statute by using that letterhead.

If that weren't enough -- we're moving back through the statute -- now we get into what I would call the second strongest argument here. And that's under 1692e(9).

Under 1692e(9), it is improper and a violation of this section -- without regard to whether or not we have some separate analysis as to whether it's false, misleading, confusing, it just is a violation if you use or distribute any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court official or agency of the United States or any state or which creates a false impression as to its source, authorization, or [34] approval.

A lot of words in there. When you filter them out, Your Honor, in looking at the letters, looking at the contracts and the other stipulations of fact that were

put in there, what we know is that this letterhead simulates -- it appears to be a letterhead from the Ohio Attorney General. We don't even have to assume that. It is because they're commanded to do it by the Attorney General. So, it definitely simulates. It is a document. And it appears to be simulating a document that's issued by an official and/or the State in this case.

If you accept counsel's argument that somehow debts certified to the A.G. become the A.G.'s debt and not the State's debts, you know, by whatever argument, this letter, at a minimum, under that section, simulates a document issued by the Attorney General.

It doesn't say it has to be true, that there's truth in it. I think there is truth in it. But, again, just looking back from the least sophisticated consumer's standpoint, that's just confusing. It had two different names. You know it violates e(14), but it also violates this section because it simulates a document issued by the A.G.

The next part of that sub-provision, Your Honor, also says it's a prima facie violation if it creates a false impression as to the source of the letter. Okay. That requires a little bit more in depth look at it because now [35] we're interpreting what "false impression" means.

Congress, in this part of that subdivision, created another sort of standard of analysis: a false impression as to the source. Well, anybody who is looking at this letter is believing that the source is the Office of the Attorney General, and we know that that's not true. It didn't come from the Office of the Attorney General. It was mailed. It was distributed.

It was prepared by Special Counsel. If Special Counsel are debt collectors and they prepared, mailed, distributed the letter, it violates this section if they use that letterhead because now it gives the impression, falsely, as to who sent it. It didn't come from the Ohio Attorney General. It came from Special Counsel. That's in the stipulations also, Your Honor.

The State had to stipulate that they didn't -- they didn't prepare the letter. In fact, they didn't even mail it. They didn't put a stamp on it and send it out. They just instructed them to use it.

So, Your Honor, in addition to e(14), e(9) has been violated. I'm not going to bore Your Honor with the other two. There is e(10), which is a more amorphous one. It's kind of a catch-all. Any deceptive communication is going to violate the statute. That would require, again, some analysis here as to whether or not this, from the eyes of a least sophisticated consumer, is confusing. And I think, at a minimum, we can say [36] that about the letters that are being sent. Whether they were something more than that remains to be seen, but I don't know that we need to get there. At a minimum, they're confusing.

Now, the other section is 1. And under Subsection 1, we get into communications that appear to allow for the use of letterhead where there is an affiliation associated with the State.

"Affiliation," Your Honor, is not a term that's defined in the FDCPA. We don't want to dwell on that section, because we don't believe the Court needs to, particularly with the cases that are out there. And the particular case dealing with e(14) on

using a name other than your own I think pretty much cements what we believe should be the proper conclusion. But affiliation, in this case, means something more than an independent contractor.

When I hear the arguments that are raised by counsel, it disturbs me because one thing we also learn is, when you have a contract, unless it's ambiguous, you read the contract for what it says, and it's binding on the parties. So, before walking into this courtroom today, the State of Ohio entered into contracts with these 82, or 83, Special Counsel and agreed -- their meeting of the minds was, you're independent contractors. Now they came in here and took a step aside and said, well, I don't know about independent contractor. Yeah, we tell them that's what it is, but, you know, we think there [37] is a closer connection or some sort of closer affiliation that this Court should recognize to fit them, or shoehorn them, Your Honor, into some sort of official or employee status so they don't fall under the FDCPA.

Looking back at the letters, one thing is also true: If anything else other than it being confusing, these letters also give the impression that the Special Counsel are employees or officers of the Attorney General. If they were, that's a perfectly fine letter. No matter what you call them, Special Counsel, outside counsel, if they are employees or they are officers, they're permitted to do it. In this case, they're not. So, one interpretation may be a little bit higher, from an intellectual standpoint, than the least sophisticated consumer is going to assume, when they receive something like this, it came from an officer or it came from an employee of the State. It

didn't. We know that. They're not employees. The State stipulated to that. We also know they're not officers because 109.08 doesn't confer upon Special Counsel an officer status.

So, if they're not an officer and they're not an employee, we've got to look at what their contract says, because that's what they agreed: Anything outside that contract really is parole evidence, really shouldn't even be talked about, much less argued, in a court. They're independent contractors. They're debt collectors.

[38] Now, when you look at the State of Ohio, on the one hand, you can go over here and make a parallel comparison to what happens in private industry. The State of Ohio is set up very similarly. Let's take Macy's for example. Macy's is a corporation. Macy's issues credit. Macy's has a legal department. Macy's has needs within its legal department to keep certain things in-house. And at times, it needs to employ outside attorneys. And there is a whole set of bylaws within the corporate structure that allow for that to happen.

Now, on the one hand, you've got Macy's. On the other hand, you've got the State. Well, the State is an organization. It has a lot of needs. It issues credit. It issues services that require repayment. It has a collections department just like Macy's does, and it also has a staff of attorneys through the Attorney General. And at times, the Attorney General needs assistance just like the in-house counsel for Macy's needs assistance to collect debts.

So, on the one hand, we have, with the State, 109.08. It says we can appoint Special Counsel to do that. But, interestingly, 109.08 restricts what that

Special Counsel's actually supposed to do with the letterhead, doesn't it? It doesn't say anything in that statute about non-tax debts. In fact, that statute is very specific, and it says that use of the letterhead in that instance pertains only to tax debts.

I didn't make the statute up. That's just what it [39] says.

Now, on the other side, you've got your bylaws that tells in-house counsel, you can hire outside counsel. If what the State is arguing is really true, then they've -- and convinces this Court to create some sort of judicial exception that doesn't exist within the statute, you can imagine what that's going to do on the outside.

Well, I'm the Special Counsel for Macy's, and I'm going to use Macy's letterhead, and I'm going to abuse every collection process I can to collect the debt for Macy's. Now, there is a very similar section not just for state employees or state officers. There is one for corporate employees and corporate officers who are collecting their own debts.

So, now, for the State, if we accept their argument that they're all affiliated and they should be considered the same and they're collecting their own debt -- I guess that's their argument -- they could never really tell us precisely what that is, but assuming that's what it is, haven't they now just created a new model for collection to get around the FDCPA?

The answer is yes.

I'm going to appoint Mr. Willison, now, as Special Counsel for Macy's. I'm in-house counsel. I'm going to appoint him. And, Mr. Counsel, you need to use

Macy's [40] letterhead. I want you to use that when you collect. Collection of our debts is very important. We have to have these debts collected. We want you to use the most aggressive means possible. And don't worry about the FDCPA, because you're an employee, or you're something. But, by the way, here is a contract. I want you to sign this. For all other reasons, you're just an independent contractor.

That's the argument I'm hearing, and that disturbs me, Your Honor.

In the end analysis, we're asking the Court to find that Special Counsel are what they are, independent contractors and debt collectors, when they collect consumer debts. We're not getting into the other issues as to whether or not they can perform other functions of the State, but we're certainly asking the Court to find that they are, for the purposes of non-tax debts, collecting consumer debts that would have application under the FDCPA.

We're also asking, Your Honor, that, for the purposes of this case, that the use of that letterhead violates federal law. And in issuing a decision, that's what we would ask.

Now, with regard to the two State statutes, I don't know that I'm in complete disagreement with Ms. Phillips on the Deceptive Trade Practices Act. We're at a disadvantage here because we didn't really make the kinds of allegations in a letter that you would see in a complaint. We didn't file a [41] complaint. We were getting ready to. Whether or not we were actually going to include that as a cause of action or not is something that we just didn't really push forward.

I think there is a loose argument in there concerned around whether or not the service being passed off is that of another, but not something we're prepared to push forward with. However, we do, for the reasons already stated by Mr. Willison, believe that in the case where, here, there are specific enumerated violations of the FDCPA, there are equivalent violations of the Consumer Sales Practices Act.

And, Your Honor, I'll conclude with that for my part of the presentation and ask that your ruling reflect our position.

Thank you.

THE COURT: Thank you, Mr. Nobile.

Ms. Phillips, or anyone else on behalf of the State of Ohio, do you wish to respond?

MS. PHILLIPS: Yes, Your Honor. May we have rebuttal?

THE COURT: Sure.

MS. PHILLIPS: May it please the Court, the first point that we would like to make is that the issue of being an independent contractor or being a debt collector is not before -- necessary to the Court's decision because we believe that the issue of deceptiveness or not is the first decision to [42] be made and that, therefore, you would not need to reach those other issues. So, we would ask that a two-step analysis be applied and that you don't have to go forward all the way if you don't -- if we get through the first step.

First of all, there is no case presented by any of the parties that addresses appointments of Special

Counsel pursuant to Revised Code 124.11 as members of the unclassified civil service of the State of Ohio. The question of whether or not they are -- Special Counsel are independent contractors is irrelevant because their authority is derived from a statutory appointment that is unique under state law. This appointment authority is pursuant to the Constitution, and the civil service has been around for -- and the appointment authority has been around a lot longer than the Fair Debt Collection Practices Act.

Special Counsel are not merely in a contractual relationship. The independent contractor status defines their compensation, their tax structure and their pension and Workers Compensation benefits, but not their authority. For example, in the ethics opinion, first of all, it's interesting to note that the ethics opinion does not address Revised Code 124.11, although it was in place at the time, but it was limited to the purposes of Revised Code 102.04 regarding the payment of being able to be paid by more than one authority.

Your Honor, I think that this would, obviously, lend [43] itself to being very narrowly defined because what you're basically saying is that government officials cannot wear multiple hats. And I'm sure you're aware that, as a general matter, many government officials wear multiple hats. So, I think that it was intended, under 102.04, to be a very narrow reading of the term "officer of the state."

There is not a definition of "officer of the state" under the Fair Debt Collection Practices Act. Frankly, it's my understanding that the definition of an "officer of the state" is much broader under the

Fair Debt Collection Practices Act than in the ethics opinion. And, in addition, it's so broad that there is a third option.

We've talked about independent contractors. We've talked about employees. We've talked about officers, but there is a government actor. And that standing is much broader than officer, and it has been used under that exact language. And I'll talk about those cases in a second.

Now, regarding the issue of one true name, yes, Special Counsel are the senders, per their return address, as required in the Peter vs. GC Services case, but the source of the letter is the Attorney General's Office. Just as when the Attorney General writes a letter and it is signed by an Assistant Attorney General, that address is different than 30 East Broad Street where the Attorney General, himself, is housed. The Attorney General has many offices and many [44] addresses, and no case holds that the truthful use of two names is wrongful.

In the Keefer vs. Wiles case that's been cited, Judge Marbley did not even reach the decision because the facts did not -- this was a decision on the pleadings, and the facts did not even include whether or not the Special Counsel in that case had been appointed. So, you know, the issue was never raised, was never addressed.

Again, I've mentioned before the Gradisher case only involved a contract, not an appointment. That was the sheriff. Like a law firm, it does not matter if a letter comes from a partner, an associate, or a staff attorney. And probably many staff attorneys are hired as independent contractors, but when they write their letters as staff attorney to the law firm,

they are under the umbrella and they are part of the law firm.

Similarly, a special master appointed by the court has authority to conduct trials for the court. Again, it's fair to say that many special masters are paid as independent contractors and do not have offices in the courthouse but work from home for much of their activity and opinion writing.

Under Gammon, the Gammon case, the parties have -- again, going back and forth -- the defendant argues that the purpose of the use of the letterhead is to elevate the debt above all others. Oh, my goodness! It's the State!

Well, that is true. The purpose of the use of the [45] letterhead is to advise consumers that this is a debt of the State of Ohio. And, yes, it does have some significant consequences attached to it that, frankly, Visa's debt do not have.

Basically, what they're arguing is that the Attorney General's Office or the State of Ohio should not collect its debt because its purpose would be to elevate those debts above Visa and others and put Visa and other creditors at a disadvantage and that's not appropriate.

The collection of this debt is of great importance to the State of Ohio, and it is important that the debtors are aware that this is debt of the State because there are consequences to State debts that there are not for other debts. Also, pursuant to 131.02 of the Revised Code, the Attorney General does have a legal obligation to collect State debt.

Now, in the Gammon case, the decision was that the collectors had falsely stated that they could use

government systems. Here, the Special Counsel can use the Attorney General's systems. In addition, in Brannan vs. United Student Aid Funds, 94 F.3d 1260, Ninth Circuit 1996, cited by the defendants, USA Funds, a private guaranty agency that guarantied certain loans pursuant to contracts with the U.S. Department of Education, was found not to be a government actor exempt from the Fair Debt Collection Practices Act.

Again, this was only a contract, not an appointment.

[46] Under 15 U.S.C. 1692a(6), a debt collector is defined as any person who uses any instrumentality of interstate commerce or the mails to collect debts, but the definition specifically excludes any officer or employee of the United States or any state to the extent that collecting or attempting to collect any debt is in the performance of his official duties. And, of course, "state" is defined as any state, territory, or possession of the United States.

In the legislative history, it indicates that the Fair Debt Collection Practices Act is not intended to include government officials such as marshals and sheriffs while in the conduct of their official duties. That's the Georgeadis vs. County of Fairfield case, 2000 U.S. District, Lexis 21724. It's Case Number C-2-99-204, Southern District of Ohio, 2000. That case was quoting Parrish vs. City of Highwood, 1998, U.S. District, Lexis 17470, Case Number 95-C-4438 from the Northern District of Illinois in 1998. Granting -- in that case, they granted summary judgment to the city and a police officer because the defendants were not debt collectors under the terms of the Act.

The Fair Debt Collection Practices Act does not define the term "officer or employee of the United States or any state." Accordingly, these words must be accorded their ordinary meaning. For example, under Limited, Inc., 286 F.3d, at 332, a dictionary may be an appropriate source for [47] determining a word's ordinary meaning. See Koyo Seiko Company vs. United States, 36 F.3d 1565, Federal Circuit 1994, or IBM vs. U.S., 201 F.3d 1367, Fed. Circuit 2000.

"Officer" has been defined as a person who holds an office of trust, authority, or command. The "public affairs" term refers especially to a person holding public office under a national, state, or local government and authorized by that government to exercise some specific function. In corporate law, the term refers especially to a person elected or appointed by the board of directors to manage the daily operations of the corporation, such as a CEO, president, secretary or treasurer.

Under Black's Law Dictionary, 1117, 8th Edition, 2004: Within the context of this definition, the ordinary meaning of "officer" would extend only to a natural individual. Therefore, an officer of the United States or state is a specific natural individual who holds public office.

Ohio's Civil Service scheme is embedded in the Ohio Constitution and Revised Code Chapter 124. And that has been referred to in Chubb vs. Ohio Bureau of Workers' Compensation, 81 Ohio St. 3d 275, 1998.

Volunteer fire fighters are in the civil service, granted state affiliation regardless of whether or how they are paid. For example, see Peters vs. City of

Jackson, 653 N.E.2d 1238, Jackson County Court of Appeals, 1995. Their status as [48] part of Ohio's government is not an artifice designed to thwart the Fair Debt Collection Practices Act, but, rather, is a legitimate extension of the state to those who conduct its official duties.

In the case Heredia vs. Green, 667 F.2d 392, Third Circuit, 1981: A landlord and tenant officer of the Philadelphia Municipal Court was held to be a state officer exempt from the Fair Debt Collection Practices Act.

Under Heredia, important factors included not only the form of the notice in question, but, also, the entire procedure involved in the case were designed and approved by the president judge.

In this case, the form of the notice and the procedures are designed and approved by the Attorney General.

The landlord and tenant officer had no authority to charge any fees other than those specifically authorized by the president judge.

Again, the Special Counsel have no ability to charge their fees other than as set forth by the Attorney General.

In addition, the fees were statutorily authorized by Pennsylvania statute. And, in Heredia, the notices at issue contained the seal of the municipal court, and the reviewing court noted favorably that the notice is designed to impress upon the tenants that the municipal court is involved to assure the tenant's attention and prompt response and to explain [49] clearly that, unless the delinquency is paid, an eviction action will be commenced in the future.

The relationships in Heredia are nearly identical to those at issue herein and support the conclusion that the Special Counsel are not debt collectors as defined in the Fair Debt Collection Practices Act. Clearly, they are debt collectors because they collect debts in the ordinary meaning of the word, but the question is whether they are exempt because they are not debt collectors if they are exempt under the Act.

In the contract, it does say that the Special Counsel are to follow the requirements of the Fair Debt Collection Practices Act. That is something that the Attorney General believes is not required by them but is a good practice. And so, for those reasons, they are required, by the contract, by the Attorney General, to follow those provisions to protect the debtors, because the debtors are our citizen voters. And that is the purpose of the Attorney General's Office, is to treat our debtors properly and legally and fairly. But that does not mean that, because they have been required by contract to adhere to that law, that they are not -- that they are actually subject to that law.

In Weiss vs. Weinberger, 2005 U.S. District, Lexis 11876, Northern District of Indiana, Hammond Division, in 2005, a court-appointed receiver was held not to be a debt collector [50] in the fair -- under the Fair Debt Collection Practices Act because receivers are well known to be officers of the appointing court.

I would submit that receivers are not the sort of officer that the ethics opinion would have included as an officer under the 102.04 analysis in the ethics opinion relied upon by the defendants. And even if they were not officers, the Fair Debt Collection

Practices Act -- the case law is divided as to whether even a corporation, a nonprofit corporation or other corporation, is a debt collector under the Fair Debt Collection Practices Act. It is not a slam-dunk decision and has been ruled upon in several directions. For example -- and they are considered government actors, is where the statement comes.

The issue arose in the context of student loan guarantees -- student loan guarantee agencies, I should say -- which may administer the guarantied student loan program and may either be a state guaranty agency or a private nonprofit agency operated in conjunction with a state department of education.

In Games vs. Cavazos, 737 F.Sup. 1368, District of Delaware, in 1990, held that a private nonprofit guaranty agency fell within the exception to the definition of "debt collectors" in 1692a(6)(C) because it was a government actor. Again, it is not identical to the standard that was employed by [51] the ethics opinion. It's a much broader standard.

Also, in Pelfrey vs. Educational Credit Management Corporation, 71 F Supp. 2d 1161, Northern District of Alabama, 1999, the Court did not reach the issue, but noted that the Games decision was squarely in conflict with the decision in Brannan vs. United States Aid Funds, which the Brannan case was cited by the defendants.

Although there are a number of decisions that hold that collectors who are merely independent contractors who are in a contractual relationship with the government to collect government debt are not excluded from the definition of a debt collector by Section 1692a(6)(C), there is no binding precedent in

this circuit and none of those courts considered contractual relationships and/or appointments that were as closely intertwined as those between the Attorney General and its external collectors.

Also, one point. The defendants had mentioned that the Special Counsel were required to indemnify the State pursuant to the contract. If you look at Revised Code 9.86, State employees are also required to indemnify the State if they exceed their statutory authority.

So, looking at the definition of a debt collector, we don't believe that the Special Counsel are debt collectors. As a matter of fact, we don't believe that the operations of the collections enforcement section are, as a whole, subject to the [52] act. But that, again, is not a decision that needs to be made in this case because we believe that the most important decision is whether or not the letters, themselves, are misleading, even to the least-sophisticated consumer.

There is ample opportunity to use two names in one letter as long as it is accurate. These letters are from the Attorney General's Office just as if an Assistant Attorney General had sent the letters. And it's our position that the Attorney General is entitled to a declaration that the use of the letterhead by Special Counsel does not violate the Fair Debt Collection Practices Act, the Deceptive Trade Practices Act, or the Consumer Sales Practices Act.

THE COURT: Thank you, Ms. Phillips.

Counsel for the defendant, sur-reply, if you wish.

MR. WILLISON: Thank you, Your Honor.

I must be the least-sophisticated attorney because

THE COURT: I knew somebody was going to say that.

MR. WILLISON: Yes, because I thought I heard the State argue, or tell us in their opening salvo, that they have debtors calling them up all the time when they receive these letters from Special Counsel saying: What is this? I don't understand. And they call the AG's Office. They don't call the law office of Eric Jones or law office of so-and-so. They call the AG's office. They're confused. But now they're telling us that it's not confusing. So I'm -- again, I'm [53] confused.

We have to keep in mind, too, that the FDCPA is a consumer protection statute. It's a remedial statute. It's entitled to a broad interpretation, a liberal interpretation, in favor of its coverage.

She says there is no case saying that Special Counsel aren't officials, but that is sort of pleading the pregnant negative. Their contracts say they're independent contractors. They say they're debt collectors in their letters. You know, it's sort of, don't believe what they're saying and don't believe what they're doing; believe what we're saying.

She talked about it covers government actors. The FDCPA is very specific. You get the exception if you're an employee or an officer. It doesn't say an employee or an officer or a government actor. It says employee or officer. They've already stipulated that they're not employees. And, by the way, in that Heredia case, this fella who was working for the

court, the landlord/tenant worker, he's an employee. Again, that doesn't -- that doesn't get us anywhere.

Then we talk about this one true name. Well, note the use of the word "name." There is no "s" on the end of "name." You can't -- it says -- it's singular. You can't have two true names. And, secondly, even if you could have two true names, the FDCPA says you can only use one true name. So there is no way that you can say that they can use both names without [54] violating e(14).

They talk about how important it is for the consumer to understand the consequences of neglecting this debt. These consequences, Your Honor, are so important that nowhere are they specified in the letters.

What they're getting at is, we are law enforcement. And that's the impression they want to leave with these people. They don't say in their letters: By the way, you should pay attention to this because we could take your tax refund; we could take your casino winnings; we could disqualify you from applying for certain jobs if you don't have your debts paid.

If that's so important, why isn't it in the letter? It's not. All they do is put that logo up there because they know that's what scares people. Then they said, well, gee, if you rule in favor of the defendant, then the A.G. can never collect its debt.

We're not saying they can't collect their debt. They can collect their own debt. If they want to hire Ms. Phillips or they have Ms. Phillips and she's an employee of the A.G.'s office, she can write letters, and she can put the A.G.'s letterhead on there, and she won't hear a peep from us. But you can't bring in

these independent contractors, these third-party attorneys who don't have anything to do with you other than signing a contract to collect debts for one third of what they get.

[55] Lastly -- well, second to lastly, they talked about holding an office. There is no office of Special Counsel. They don't hold an office. They've been engaged as attorneys to represent – and debt collectors -- to represent the Attorney General's Office to collect these debts. They have not been appointed to an office. And that's where that Ethics Commission issue is still important. They haven't been appointed to an office.

The other thing that is most troubling, I think, in this whole case is that the Ohio Attorney General is supposed to enforce the law. They're not supposed to send out their letterhead to allow other people to break it.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Willison.

Ladies and gentlemen, thank you for your oral argument, your briefing, and your stipulations. The Court will try to issue its decision in due course.

"Due course" doesn't mean anything. Okay? I just don't want you guys calling me up and saying: Well, you said "due course," and we assumed that meant two weeks, or one day, or something like that.

It doesn't mean anything. We'll get to it when we can get to it.

Thank you.

(Whereupon, the proceedings were concluded at 10:28 [56] a.m.)

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[57]

CERTIFICATE

United States of America

Southern District of Ohio

I, Denise N. Errett, Official Court Reporter of the United States District Court for the Southern District of Ohio, do hereby certify that the foregoing 56 pages constitute a true and complete transcription of my stenographic notes taken of the proceedings held in the afore-captioned matter on the 30th day of January, 2013.

In testimony whereof, I hereunto set my hand on the 8th day of March, 2013.

/s/ Denise N. Errett, FCRR
Denise N. Errett, FCRR
Official Court Reporter
Southern District of Ohio

Doc. 48-16 **EXHIBIT G**

[Letterhead of Ohio Ethics Commission]

Advisory Opinion 75-016
August 19, 1975

Syllabus by the Ohio Ethics Commission:

> Special counsel, appointed by the Attorney General of Ohio pursuant to Section 109.08 of the Revised Code, are independent contractors and therefore are not prohibited by Section 102.04 (A) of the Revised Code from receiving or agreeing to receive, directly or indirectly, compensation for services rendered or to be rendered by them personally, in any case, proceeding, application or other matter which is before the General Assembly or any department, division, institution, instrumentality, board, commission or bureau of the state.

* * * * * *

Your request for an advisory opinion asks whether an attorney appointed by the Attorney General of Ohio as special counsel, pursuant to Section 109.08 of the Revised Code, falls within the purview of Section 102.04 (A) of the Revised Code. You state you are an attorney actively engaged in the private practice of law and as such personally represent clients, for compensation, in matters before various agencies, departments, boards, bureaus and commissions of the State of Ohio. You further state, the attorney general has appointed you special counsel to collect claims certified to the attorney general as owed to

various state departments and agencies. Section 102.04 (A) of the Revised Code states:

> "No person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission or bureau of the state, excluding the courts, shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter which is before the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts."

Special counsel are not within the purview of Section 102.04 of the Revised Code by virtue of being "elected to an office" nor do they seem to be "appointed to an office" of an instrumentality of the state.

To be "appointed to an office" the position to which the appointment is made must be a constitutionally or statutorily created office. Section 109.08 of the Revised Code states:

> "The attorney general may appoint special counsel to represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect.

> Such special counsel shall be paid for their services from funds collected by them in an amount approved by the attorney general."

Thus, the attorney general may through appointment, engage special counsel, under the provisions of Section 109.08 of the Revised Code, to collect those claims certified to the attorney general from other agencies of the state for collection or such other claims as the attorney general is authorized to collect.

Special counsel of the attorney general, thus, are not appointed to an office of an instrumentality of the state for purposes of Section 102.04 (A) of the Revised Code but are rather engaged as an agent of an elected officer of the state.

The issue of whether special counsel fall within the purview of Section 102.04(A) of the Revised Code, thus, turns upon whether they are "persons employed by any instrumentality of the state" as that phrase is used in Section 102.04 (A) of the Revised Code. The Ohio Ethics Commission has determined that independent contractors of public agencies are not included in that class of persons described by the phrase "employed by" as used in Section 102.04 of the Revised Code.

The Ohio Ethics Commission in Advisory Opinion No. 75-012 applied the following tests to distinguish employees from independent contractors:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in that locality the work is usually done under the direction of the employer or by a specialist without supervision;

(d) skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work;

(f) length of time for which the person is employed;

(g) the method of payment, whether by time or by job;

(h) whether or not the work is a part of the regular business of the employer; and,

(i) whether or not the parties believe they are creating a relationship of master-servant.

The Ohio Ethics Commission went on in that Advisory Opinion to establish, for purposes of the ethics law, as the primary test, (b), whether the one employed is engaged in a distinct occupation or business. The Commission cautioned, however, that seldom does this test, standing alone, control, and the other tests must also be examined.

It is necessary, therefore, to apply all of the tests listed above to the relationship of the attorney

general and special counsel as that relationship is established by Special Counsel Outline of Procedures (Revised January 1971) published by the Claims Section, Office of the Attorney General, Section 109.08 of the Revised Code; and the specific situation of the individual appointed special counsel.

(a) Extent of Control

Special counsel are authorized to act on those specific matters referred to them by the attorney general, in the manner prescribed by statute, and as directed in the Outline of Procedures. However, no control is exercised by the attorney general over the manner in which special counsel collect claims other than those statutorily imposed limits placed on any individual or entity responsible for the collection of claims.

(b) Distinct occupation or business

You state you are an attorney actively engaged in the private practice of law. Therefore, you have an occupation, that of the private practice of law, distinct from the attorney general's occupation, that of chief law officer of the state.

(c) Kind of occupation; with reference to supervision

The initial collection of claims owed the state is usually done by special counsel rather than employees. Engaging special counsel rather than full-time salaried employees to collect claims on a contingency basis allows the attorney general to more economically and efficiently collect claims. Thus, the initial collection of claims is work usually done for the attorney general by special counsel without supervision rather than an employee.

(d) Skill required

Since special counsel are hired for their legal expertise, it would be reasonable to conclude they have particular skills required for the collection of claims.

(e) Supplies, instrumentalities, tools and place of employment

The attorney general does not provide special counsel with office space, resource material, clerical services, or any other office supplies. The Special Counsel Outline of Procedures particularly stated special counsel may not use attorney general's office stationery but must provide their own. Thus, special counsel provide their own instrumentalities, tools, and places of employment.

(f) Length of time for which the person is employed

Neither, Special Counsel Outline of Procedure, Section 109.08 of the Revised Code nor the letter of appointment which you enclosed with your request specifies the exact length of time of the appointment. The letter of appointment, however, states special counsel shall represent the attorney general in such matters as may be referred to special counsel "from time to time" by the attorney general. This suggests special counsel are hired on a project-by-project basis rather than as full-time or part-time employees.

(g) Method of payment

Section 109.08 of the Revised Code provides, that, special counsel appointed under this section are paid for their services from funds collected by them in an amount approved by the attorney general.

The Special Counsel Outline of Procedure describes the method of payment or non-payment and provides that no expenses incurred in the collection of claims will be paid by the attorney general; that fee checks will be sent monthly after the collections are remitted in full to the attorney general; and that the fees are paid at the attorney generals discretion; as provided in Section 109.08 of the Revised Code.

(h) Whether the work is part of the regular business of the employer

The collection of claims certified to the attorney general or claims which the attorney general is otherwise authorized to collect is, by statute, a part of the regular business of the attorney general.

(i) Whether the parties believe they are creating the relationship of master-servant

Your request for an advisory opinion indicates you believe that the relationship is that of an independent contractor. You state that, "I receive no compensation from the attorney general for my services other than a percentage of funds actually collected by me on a contingency basis. My compensation is not subject to withholding for federal or state income tax and I am not eligible for Public Employees Retirement System membership or state hospitalization and other employee benefits. I am not subject to supervision of the attorney general in the collection of claims, other than the establishment of broad policy guidelines applicable to all claims certified to him, and I may refuse to accept any claim which may be referred to me." In addition, the attorney general has traditionally distinguished special counsel from

regular employees of the attorney general in method of payment, hours worked, and responsibilities.

In review, the primary test of distinct occupation is determinative in that special counsel have a distinct occupation, that of an attorney engaged in the private practice of law,-and as such seem to be independent contractors. In balancing this determination with the other test conclusions, additional support is found for the determination that special counsel are independent contractors.

The following test conclusions are supportive of the determination:

(a) No control is exercised by the attorney general as to the manner in which the special counsel goes about collecting claims, those limits which are imposed on special counsel are those imposed upon any individual or entity responsible for the collection of claims owed to the State.

(c) Special counsel are hired to do work usually done by a specialist without supervision rather than an employee.

(d) Special counsel are hired because of a particular skill, their legal expertise.

(e) Special counsel provide their own instrumentalities, tools and place of work.

(f) They are employed on a project-by-project basis.

(g) They are paid a percentage of the claims they collect rather than a regular salary.

(i) Both the attorney general and special counsel believed they were creating a relationship of employer-independent contractor.

Thus, in balancing the tests, the Ohio Ethics Commission concludes that special counsel, appointed by virtue of Section 109.08 of the Revised Code, are independent contractors. This opinion does not necessarily apply to special counsel appointed, by virtue of Section 109.07 of the Revised Code or any other Section of the Revised Code, to represent the state in court actions, criminal prosecutions, or other proceedings.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that special counsel appointed by the Attorney General of Ohio pursuant to Section 109.08 of the Revised Code are independent contractors and therefore are not prohibited by Section 102.04 (A) of the Revised Code from receiving or agreeing to receive directly or indirectly compensation for services rendered or to be rendered by them personally, in any case, proceeding, application or other matter which is before the General Assembly or any department, division, institution, instrumentality, board, commission or bureau of the state.

OHIO ETHICS COMMISSION
(Mrs.) Barbara H. Rawson,
Chairman

Doc. 60-1 **EXHIBIT 1**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 2:13-cv-00212
Judge James L. Graham
Filed: March 4, 2014

PAMELA GILLIE, *et al.*,

Plaintiffs,

vs.

LAW OFFICE OF ERIC A. JONES, LLC, *et al.*,

Defendants.

AFFIDAVIT OF SARAH SHERIFF

STATE OF OHIO)
) ss.
COUNTY OF FRANKLIN)

Sarah Sheriff, being duly cautioned and sworn, deposes and states:

1. She has personal knowledge of the facts recited in this Affidavit.

2. In July 2012, she was employed in the collection department of Wiles, Boyle, Burkholder & Bringardner.

3. She worked under the supervision of Mark Sheriff, who was appointed Special Counsel by the Ohio Attorney General.

4. She assisted Mr. Sheriff in the collection of debts owed to the State of Ohio.

5. She recalls Hazel Meadows being sent communications about a debt.

6. She acted under Mr. Sheriff's supervision and was also subject to the supervision of representatives of the Ohio Attorney General.

7. When communications were ignored in 2007, a lawsuit was filed, and Mrs. Meadows, who had representation by an attorney, signed an agreed judgment entry.

8. As a result of that agreed judgment, Mrs. Meadows made payments for several years.

9. The letter attached to this Affidavit as Exhibit A and to plaintiffs' motion as Exhibit B1 was generated in response from a call from Mrs. Hazel Meadows in which she asked Ms. Sheriff for her balance and well after Mrs. Meadows had signed off on an agreed judgment entry.

10. In response to that inquiry, Ms. Sheriff sent the letter attached as Exhibit A.

11. Since she was responding to an inquiry, and payments were being made, she was unaware that her signature as opposed to Mark Sheriff's signature might be a violation of the law.

12. She does not recall signing any other letter as Special Counsel, as she was responding to a specific inquiry about a balance with Mrs. Meadows.

13. Since she received the call, she thought at that time that it was appropriate for her to sign the letter responding to that inquiry.

14. As the use of state letterhead was required by the Ohio Attorney General, she did not believe or have any knowledge that such use was improper or that it could violate the Fair Debt Collection Practices Act.

15. In her years at the Wiles office, Attorney General letterhead was used in the collection of debts for the State of Ohio.

16. Further affiant sayeth naught.

/s/ Sarah Sheriff
Sarah Sheriff

Sworn to before me and subscribed in my presence this 4th day of March, 2014.

/s/ Kellie S. Kesselring
Notary Public, State of Ohio

[notary seal]

Doc. 60-2 **EXHIBIT 2**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 2:13-cv-00212
Judge James L. Graham
Filed: March 4, 2014

PAMELA GILLIE, *et al.*,

Plaintiffs,

vs.

LAW OFFICE OF ERIC A. JONES, LLC, *et al.*,

Defendants.

AFFIDAVIT OF MARK J. SHERIFF

STATE OF OHIO)
) ss.
COUNTY OF FRANKLIN)

Mark J. Sheriff, being duly cautioned and sworn, deposes and states:

1. He has personal knowledge of the facts recited in this Affidavit.

2. In 2012, he was appointed Special Counsel by the State of Ohio to collect state debts. He had a series of such appointments as such appointments are made annually by the Attorney General. In prior years, Bruce Burkholder was the appointed special counsel.

3. He has reviewed the Hazel Meadows file in his office.

4. Mrs. Meadows was contacted in 2007 about a debt that Mrs. Meadows owed the State of Ohio. This debt was the same debt that was the subject of Exhibit A.

5. After these efforts to work with Mrs. Meadows were unsuccessful, a lawsuit was filed, and Mrs. Meadows executed an agreed judgment entry on March 6, 2008 and entered into a monthly payment plan in attempt to pay off the debt referenced in Exhibit A. A true and accurate copy of that judgment entry is attached to this Affidavit as Exhibit B.

6. In order to make sure that letters are signed properly, there are periodic reviews of files.

7. The Attorney General also has detailed procedures and performs annual audits to ensure that these procedures are followed.

8. After Exhibit A was brought to his attention, he had his staff review all the Special Counsel collection files and no other letters which were signed by a staff member as Special Counsel were found.

9. Further affiant sayeth naught.

/s/ Mark J. Sheriff
Mark J. Sheriff

Sworn to before me and subscribed in my presence this 4th day of March, 2014.

/s/ Kellie S. Kesselring
Notary Public, State of Ohio

[notary seal]

EXHIBIT "B"

IN THE AKRON MUNICIPAL COURT
SUMMIT COUNTY, OHIO

Case No. 07CV11656
Judge McCarty
Filed: March 6, 2010

STATE OF OHIO – UNIVERSITY OF AKRON

Plaintiff,

v.

HAZEL MEADOWS

and

Defendant(s)

AGREED JUDGEMENT ENTRY

Now comes the Plaintiff by counsel and the Defendant, with counsel, who now represent to the Court that this case has been settled and compromised and that the Defendant agrees to confess judgment for the full amount prayed for in the Complaint, plus cost, plus interest.

As an accommodation to the Defendant, the Plaintiff has agreed that it will accept $50.00 per month beginning 03/20/2008 and on the 20th of each and every month thereafter until 3/20/2009 then paying $100,00 per month beginning 4/20/2009 until the judgment is fully paid and satisfied.

The Plaintiff agrees that it will not cause any executions to issue other than a Certificate of Judgment to be filed as long as the Defendant makes each and every Installment as agreed. All payments

are to be paid to the office of Bruce H. Burkholder, Attorney for Plaintiff, 300 Spruce St., First Floor, Columbus, OH 43215.

The Court having no objection to the settlement agreement and terms therein, does hereby **ADJUDGE, ORDER AND DECREE** that judgment is granted against Defendant for the sum of $4,500.00, plus costs and interest at the rate of 5.0000% per annum and that the settlement agreement incorporated herein is hereby **CONFIRMED**.

IT IS SO ORDERED.

Dated: 3/6/08 /s/Judge McCarty
Judge

Respectfully Submitted,

By: /s/Bruce H. Burkholder
Bruce H. Burkholder(007443)
bburkholder@wileslaw.com
Mark J. Sheriff(0019273)
Attorney for Plaintiff
300 Spruce St, Floor One
Columbus, OH 43215-1173
614/221-5216 Fax 614/221-0624

/s/Hazel Meadows
(Defendant)
Hazel Meadows
717 S Terrace Ave
COLUMBUS OH 43204

/s/Gary George
Gary George (0064933)
Attorney for Defendant

Unofficial Transcript from
Sixth Circuit Oral Argument

[No official transcript was prepared; this was transcribed from audio available to all on the website for the U.S. Court of Appeals for the Sixth Circuit: http://www.ca6.uscourts.gov/internet/court_audio/audSearch.htm]

March 3, 2015

Clerk Calling Case:	Case number 14-3836 Pamela Gillie and others versus the Law Office of Eric A. Jones and others. Arguments not to exceed 15 minutes per side. Mr. Nobile for the appellant.
Mr. Nobile:	Judge Gilman, Judge Clay, Judge Sutton, my name is Jim Nobile, and I represent Hazel Meadows and Pamela Gillie, the appellants in this case. Judge Clay I ask the court to allow me to reserve five minutes for the rebuttal.
Judge Clay:	Very well.
Mr. Nobile:	In preparing for today's argument, I looked up an old quote I'm sure everybody's familiar with. It's my understanding that it comes from James Witcomb Riley, an Indiana poet. And he observed that when he saw a bird and that bird walked like a duck, it quacked like a duck, and swam like a duck, he could conclude,

as a humorous way of deductive reasoning, that it was a duck. The first problem with this court's, lower court's decision had to do with the court's observation of what should have been the duck; in this case an actual officer of the state of Ohio. The court ruled that special counsel, who we maintain are private ...

Judge Sutton: Your duck/non-duck is employee versus independent contractor? That's your duck versus non-duck point?

Mr. Nobile: In some respects yes...

Judge Sutton: ...So what if I think that's a false dichotomy when it comes to this case and what matters in this case. And that what matters in the material representation here is whether these folks are agents. And it seems to me there's no doubt they're agents of the state.

Mr. Nobile: Yet, your Honor they disclaim agency as a matter of contract with the state that specifically stated in their agreements that they have no agency relationship.

Judge Sutton: No, no, no. They're acting—no they're acting as agents for the state in collecting these debts. They're not disclaiming that, that's the whole point of their agreement. And that's what accurate, you know, not

misleading about the letter.

Mr. Nobile: That they are agents acting on behalf of the state?

Judge Sutton: Yes.

Mr. Nobile: Well, your Honor, I think the same can be said with practically any debt collector that's a third-party collecting for another entity—that they're acting on behalf of that entity to collect the obligations. The definition of whether or not they're a debt collector or, in this case, whether they should be excepted from that definition turns on a different question. Not necessarily the agency.

Judge Sutton: I think when we talk about any other debt collection relationship we don't need to go there. We should talk about ones in which people collect debts on behalf of the state. The state's allowed to do this, the state doesn't have to hire a thousand debt collectors, right?

Mr. Nobile: It's true.

Judge Sutton: It doesn't—this section of the AG's office is allowed to have—whatever it has—10 to 15 people, and then they have a lot more debts than 10 to 15 people can handle. So they can contract out and have these people act as agents of the state to collect the debts. I'm just really puzzled what's

so unusual about that.

Mr. Nobile: I don't think there's anything unusual about it. I think that that is far from a mystery. I think it is actually the answer to the question. But that does not except them from being a debt collector under the FDCPA. Simply because they act on behalf of the state or are an agent of the state, in fact, does not lead to the conclusion that they are a government officer or employee of the state that would entitle them to be excepted from the statute.

Judge Sutton: Fair enough. What then's misleading about these letters? If they're agents of the state and the state wants you to use this letterhead...

Mr. Nobile: The courts' and this court's rulings materiality goes to kind of the heart of whether or not the statement made or the representation made tends to mislead or confuse a reasonable but unsophisticated consumer. So we're not dealing with your Honors, or me, or any of the other lawyers and law clerks in this courtroom. We have a pretty sound appreciation of how things work and what things appear. But the least sophisticated consumer does not. In this case, what was presented to these consumers, as your Honors have probably seen, is a letter that came on stationary and

letterhead with the name Mike DeWine, Ohio Attorney General. And in the other case, the Office of the Attorney General Collections Enforcement Section.

Judge Sutton: But I mean, even the least sophisticated consumer is—we assume will read the whole thing. Right? So they will read where it says Mike DeWine, but they'll also read where it says Eric A. Jones, Outside Counsel for the Attorney General's Office.

Mr. Nobile: Indeed.

Judge Sutton: Okay.

Mr. Nobile So to the least sophisticated consumer, the question back is who sent me the letter? Did I get that from Mike DeWine, or did I get that from, in this case, Eric Jones, or did I get that from the person who inked...

Judge Sutton: Why isn't it crystal clear? Eric Jones, Outside Counsel for the Attorney General's Office that explains why Mike DeWine's name and the attorney general's name is at the top.

Mr. Nobile: And yet, your Honor, the attorney general has in open court informed the district court on more than one occasion that many different telephone calls come to their office

with that very question. Who sent me this letter? I'm getting a letter from Mike DeWine. What exactly is this? And they have to tell them to contact the other individual who signed the letter in the case. Or in this case, Eric Jones or Mark Sheriff. So I think that to the least sophisticated consumer, there's very little that's clear about that letter. What is clear is that the most prominent observance of that letter is the letterhead itself. I mean, that's the one chief characteristic of the letterhead. When I send somebody a letterhead on my law firm's stationary, I want them to know it came from my law firm. And that's why you use stationary. You know, our—underneath all of the arguments that we make, our belief is that the reasons for doing this are pretty clear. That it leads and it creates this sense of urgency and that it's coming from Ohio's chief legal counsel. And it creates in that individual a fear and/or at least a prioritization issue that they should take care of this particular debt before, perhaps, another. And it is that problem, your Honor, that I think...

Judge Sutton: ...so if there's no letterhead but it says the exact same thing— Outside Counsel for the Attorney General's Office— what happens to the case?

Mr. Nobile: There was never a case.

Judge Sutton: That's what a hypothetical is.

Mr. Nobile: No, no, no. That's what I'm saying. There would never be a case, your Honor.

Judge Sutton: You would agree there's no problem there?

Mr. Nobile Right.

Judge Sutton: Even though it says Attorney General's Office?

Mr. Nobile: It does... It does describe that and that's accurate, but it doesn't indicate or simulate a document that came from, directly, the Ohio Attorney General. It just says that—and it could have been said with more clarity, I think, but I don't know that that would rise to the level of the violation that we have in this case. But materiality being what it is—I mean, in our brief I think we indicated that we think materiality, at least with respect to two of the subdivisions that we have, is really a non-issue. It's already subsumed. If you use or distribute a document that simulates government-issued material—that's under e(9)—the use of it is the violation. It's not the false representation aspect of it in which we have a materiality proof element. And the same would be true under

e(14), which is using a name that's not your true name.

Judge Gilman: Do you have any case directly on point that supports your position?

Mr. Nobile: We have cited, your Honor, the case of *Boyco*, and I believe *J.C. Christensen* was the other two cases that indicated that materiality is subsumed into those elements.

Judge Gilman: No, I mean on the key point that the use of, say, a letterhead like this—the Ohio attorney—makes it misleading, gives you a right-of-acts under the Fair Debt Collection Practice Act?

Mr. Nobile: Well, there were a number of cases, your Honor, that we did cite: *Gradisher* was a case from the Eastern District of Michigan in which an individual was using the letterhead of the sheriff's department in a similar fashion. And that was held to be in violation of e(14). That would be the main case. As far as the other cases involving a letterhead or use of names not their own those were all cited in our brief too. *Brannan*, *Palichy*, I think *Knight v. Shulman*; *Kiefer* was a southern district case that actually dealt with special counsel. They never reached the issue but Judge Marbley did lay out what he believed was the test, but that had more to do with the nature of whether or not that individual was an officer or

employee of the state.

Judge Sutton: What happens if it's the Mike DeWine letterhead, Attorney General, then it says Eric Jones, and then it's the Office of the Attorney General? And it says Agent of the Attorney General? Some of the words—in my hypothetical, Eric Jones actually works in the office. Okay? So the name's the same Eric Jones—but he actually works in the office. He's a quote "employee." But it's signed Agent of Attorney General. That's what he puts below his name. That the letterhead—so you still have the same disconnect for the consumer that you're worried about 'cause they're thinking did the Attorney General send this to me? Because I see this on the letterhead. And that's—so you have the same confusion problem there.

Mr. Nobile: Your hypothetical, your Honor—aren't you indicating that the attorney general and an employee of his office actually did send the letter?

Judge Sutton: Well, all it says is Agent of the Attorney General, that's all it says. Plus an address.

Mr. Nobile: I'm sorry, maybe I misunderstood. I thought you had said Eric Jones was actually working...

Judge Yes. In my hypothetical, he is.

Sutton:

Mr. Nobile: Okay well that...

Judge Sutton: So I'm saying you have the same confusion. Did Eric Jones send this as agent 'cause it's signed the Agent of the Attorney General, or did Mike DeWine send this? I don't think you think that's troubling. I don't think your theory of a case would allow that to be troubling, but it seems to me to present the same confusion.

Mr. Nobile: Well, the theory of our case is straight to the issue of whether a third party who has no visible connection to the A.G., the OAG in this case, other than

Judge Sutton Being an agent.

Mr. Nobile: a letterhead itself. Other than being an agent or somebody under contract where they actually disclaim being an agent. There's an entire contract that goes through point-by-point what they can and cannot do. And it just in practically every part of that contract, disassociates...

Judge Sutton: But they're an agent for purposes of what they're doing in these letters.

Mr. Nobile: As are all third-party debt collectors. Agents of the creditors they collect.

Judge Yes

Sutton:

Mr. Nobile: So if your Honor's analogy is—and I'll finish with this—is that a debt collector simply by being an agent is entitled to an exception to the Act...

Judge Sutton: It's not, it's just not misleading. They're an agent. They're an agent of the party in the letterhead. What's the problem with that? IBM has debt collectors, and why can't you send them an IBM letterhead and just say you're a debt collector, you're hired by IBM to collect the debt?

Mr. Nobile: I think that's the real problem here. If that is the slope that we go down, IBM can appoint somebody as a debt collector, they can use or not use. Just not comply with the FDCPA whatsoever. There is no materiality if the FDCPA doesn't apply. If the FDCPA does apply and they use the letterhead that they're an agent and they're not an employee then they're using a name that's not their true name. Thank you.

Judge Clay: Thank you. Counsel you may proceed, on behalf of your client.

Mr. Gentry: Good morning. If it please the court, I'm Boyd Gentry on behalf of the defendants, appellees Eric Jones and law office of Eric A. Jones, LLC. The appellees are in three camps, and we'll be splitting our time five minutes

each.

Judge Clay: Alright.

Mr. Gentry: The special counsel here are not debt collectors because they were authorized by law to perform the duties of the Office of the Ohio Attorney General. Ohio Revised Code § 109.08 specifically permitted the appointment of special counsel.

Judge Clay: The only problem is that your—at least your client and the other defendants—are independent contractors who do not purport to be employees of the attorney general. And the contract makes you responsible for all your own expenses, and you're paid only out of the money you collect. You're not drawing money from the state. That makes you far removed from the attorney general's office except insofar that you're carrying out these specified contract responsibilities. Wouldn't you say?

Mr. Gentry: And that's where this case comes in—is where the special counsel are fulfilling these duties, which they are authorized by law to fulfill.

Judge Clay: But that doesn't make you an officer of the attorney general. Because then you're holding yourself out as being a state actor if you're an officer of the Attorney General.

Mr. Gentry: Well the—what the district court relied on here was a definition of officer from the Dictionary Act saying that you were an officer if you were authorized by law to fulfill the duties of the office. Here, it's our position that the Ohio Revised Code specifically authorized the appointment of the special counsel to fulfill these duties. And so to the extent that they are not fulfilling these duties, to the extent they may carry on other activities unrelated to the attorney general, they would not be officers.

Judge Clay: Well one argument might be that an officer of the state would be authorized to carry out all the duties of the office that he purports to hold. Not just one specified duty. For example, that of a debt collector. I mean, if an officer of the attorney general can carry out the duties of the attorney general and any duties assigned by the attorney general that would be one thing, but if you're hired with one specific purpose which you don't need to be a officer of the attorney general to fulfill, i.e., collecting debts, then it becomes more problematical as to whether you're actually an officer of the attorney general.

Mr. Gentry: I understand that context, and here

we're not arguing that everything that special counsel might do is—puts them in a position of an officer under the Dictionary Act, and we're not saying that everything that the—Mike DeWine could do, that the special counsel are authorized to do. They have a limited appointment, but it is an appointment under law authorizing them to take the very conduct that is at issue here. And so in that sense, they were fulfilling the duties of the office of attorney general. They were not involved in criminal investigations or law enforcement investigations that Mike DeWine might take on. But they were involved in fulfilling their duties to collect debts owed to the state, and that is by statutory appointment. The analysis of employee versus contractor is simply not involved in the definition of officer. And so the idea that someone has a different status of whether they have a W-2 relationship or some 1099 relationship doesn't factor into whether someone is an officer. The only test is, under this part of this case is, were the special counsel authorized by law to fulfill these duties. And...

Judge Gilman: Do you have any case directly supporting your position on that?

Mr. Gentry: Well, it would be the definition in the

Dictionary Act that, and so I'm relying on the statute...

Judge Gilman: Do you have a case that says that?

Mr. Gentry I—we don't have a case involving special counsel appointed under the FDCPA, no.

Judge Gilman: I couldn't find one either.

Mr. Gentry: We do not have it. There are other cases that were—there was liability found under the FDCPA for persons who were not authorized by law to carry out certain official duties, and they were found to have liability, but here there was such authorization.

Judge Clay: Let me ask you this. Since you're an independent contractor and as you go about collecting these debts I presume that you do not receive any day-to-day oversight and supervision by an immediate officer or supervisor in the attorney general's office. In other words, you're delegated the responsibility to go and collect these debts, and you proceed to do that on your own pursuant to the provisions of the contract you entered into with the state. But there's no state employee in the attorney general's office that's sitting there supervising what you do as you go about collecting specifically each and every debt. Would that be a

fair statement?

Mr. Gentry: I'm out of time, your Honor. Is it okay if I respond to that?

Judge Clay: Yes, yes.

Mr. Gentry The—it's true that there is no state W-2 employee sitting in the law office of Eric A. Jones every day supervising this.

Judge Clay: No, no. I mean, is there someone in the attorney general's office who's supervising you on a day-to-day basis as you collect these debts?

Mr. Gentry: It is a very close working relationship that—where there is supervision and requests and sharing of information back and forth, but I don't know if you could describe it day-to-day supervision. The attorney general's office does control and supervise what is done...

Judge Gilman: Look, if you're an independent contractor, that, by definition, means no, nobody's supervising you. That's what makes you an independent contractor.

Mr. Gentry: Well, I guess it depends, I don't know really what the definition of a day-to-day supervision is. Then I guess I'll concede that.

Judge Clay: Well, if you're given instructions to collect a debt from Maple Jones, you're not—there's nobody in the

attorney general's office saying whether you should negotiate the debt on Wednesday rather than Friday or whether you're calling her too much, or whether you're harassing the debtor unduly, or whether you should file suit at this particular time. You don't have that level of supervision with the attorney general I take it.

Mr. Gentry: There's nothing in the records suggesting one way or another on that topic...

Judge Clay: Yeah, but you know what the answer is because your client is doing this or not.

Mr. Gentry: These specific questions were not addressed. I don't know the answer to them personally. How much—the question comes as should you call them tomorrow or is this type of conduct—don't do this—this is harassing? I think there is a mix of that, how much I don't know. The record, we didn't get that far. The record doesn't show that.

Judge Clay: Well, I'm not asking what's in the record. But you know what the supervisor relationship is. At least I hope you do since you're trying to satisfy your client, the attorney general.

Mr. Gentry: I have an understanding of it. I'm not sure if I have facts sufficient to

accurately state this for your Honor.

Judge Clay: Alright. Okay. Thank you.

Mr. Gentry: Thank you.

Mr. Close: Please the court, counsel. My name is Mike Close. I represent the Defendants Sheriff and Wiles Boyle. Judge Clay, I'm going to take the opportunity just to answer that question you asked about supervision. There is no one from the attorney general's office sitting in the office. However, they review the files on a continuing basis; they pull files back; they reassign files; and more importantly, on a regular basis, they're in the office doing audits to ensure that we're complying with everything we're supposed to comply with. And that would particularly be in the area, for instance, of security information and so forth. For instance, you've got to have a segregated place from all the rest that goes on in your office for these collectors because the information that are on tax returns that might be in the file with the social security number, and so forth, are absolutely confidential. And that's a good way to lose the contract with the attorney general is to not keep that stuff separate according to their very strict guidelines. Secondly, when you look at this case, there's a difference

between Meadows and Gillie.

Judge Clay: Before you to go to that point, let me follow up on your first answer there. If the lawyer who's working for the state and doing these debt collections under contract with the state—that lawyer is not working exclusively for the attorney general, I take it. In other words, that lawyer has other clients and other matters. He's not he's not assigned to attorney general matters or debt collection matters exclusively.

Mr. Close: Since we're outside the purview of what's in the record, I would tell you that that varies. There are attorneys in the state that my belief is that's all they do, is collect for the attorney general. I know that within the Wiles law office, the two attorneys that are assigned primarily to collection, do virtually nothing but creditor's work. They don't do other law practicing. If that is, in fact, your question.

Judge Clay: Yes, yes.

Mr. Close: They don't do anything else.

Judge Clay: But that's because they want to. I mean they're not required...

Mr. Close: Because I told them they had to.

Judge Clay: You told them. Is that what you said?

Mr. Close: Yes sir, that's what I said. But they're assigned, in the office, responsibility,

certainly and that's the limit of those responsibilities. I'd like to just address some attention to one area that I think goes by. And although I'm not conceding anything that Judge Graham did was incorrect, one of the issues that's important as it relates to my clients is that there was no confusion of any kind because the client had been represented by a lawyer. And actually had entered into an agreed judgment in 2008 to pay off the debt she owed the state of Ohio for her tuition. She made those payments for years. Then all of a sudden calls one of the collectors at the Wiles firm that worked for Mark Sheriff and said, "How much do I still owe?" And if you'll look at the fact that stuff that is in the file, the collector made a response that said "You're outstanding balance is so-and-so. Let me know if you've got any other questions." Not only was it not a dunning letter, but there was no confusion because Ms. Meadows knew exactly what she was dealing with. I think that highlights...

Judge Gilman: Did Ms. Meadows testify she was confused?

Mr. Close: I'm sorry?

Judge Gilman: Didn't Ms. Meadows testify that she was confused.

Mr. Close — I don't know that she ever testified to that, your Honor. I know that on the issue of whether or not she made the phone call, she said in an affidavit she didn't remember whether she did or not. And, of course, our collector had records that the call had been made and that this letter had been sent out in answer to it. I don't know that whether or not you can just say "I am confused" is accurate because it'd be so self-serving that I don't know it's worthy of even consideration as far as evidence is concerned when you have been represented by an attorney and have made those payments for a period, at that time, of roughly four years.

Judge Sutton: — Mr. Close, this is a question for you, the attorney general, and for the plaintiffs on rebuttal. The way I'm looking at the case has nothing to do with officer/employee. Just forget that. Assume for the sake of—just listen—assume for the sake of argument, the statute applies in that respect. Now the question is, has someone created a false impression as to their source authorization or approval? Or simulated official communications? And you don't get anywhere without falsity. And what I don't understand about this case is sending a document with the A.G.'s letterhead gives the so-called bad

impression, that is, it gives the impression it came from the attorney general to collect this debt. Answer, it did.

Mr. Close: It did.

Judge Sutton: That's what an agent does. And so I don't—I'm just—I'm really struggling with what the issue of fact is about a falsity. I don't understand how anyone can say these contracts, special counsel contracts didn't make each one of these lawyers, non-lawyers—who cares—agents of the attorney general in collecting these state debts. That was accurate from the beginning.

Mr. Close: Your Honor, I would only say that although I'm inclined never to concede anything, if I conceded for a minute that officers didn't matter—whether he was an officer or an employee—any of that, I would agree with you. What on this is inaccurate? We're not saying that we are the attorney general. We say specifically we're special...

Judge Sutton: ...any more than Eric Jones, if he was an employee of the attorney general, is purporting to be the attorney general. Of course, he's not the attorney general. When you see one name saying Mike DeWine and another name being not Mike DeWine, of course, it is an agent of the

attorney general. It matters not whether it's an independent contractor, an employee, or some other relationship between principals and agents.

Mr. Close: Your argument is well made, your Honor. Thank you.

Mr. Conomy: Good morning and thank you. I'm Assistant Attorney General Chis Conomy, and I'm authorized to represent the intervening defendant-appellee Mike DeWine because I've been appointed to do so pursuant to his statutory authority. It has nothing to do with my manner of supervision or the way I am paid. It is the appointment that gives me authority to stand here and represent him and, at times, the state. To get right to your point, Judge Sutton, there is nothing false here. The decision of the district court must be affirmed because regardless of the officer, employee, debt-collector definition, there's nothing deceptive in the accurate portrayal of the relationship in this case. It must also...

Judge Sutton: So I think the response they're gonna give—and I want to make sure you have a chance to respond to it—is, well this line of argument would not just apply to states when they have special counsel. What would happen

with, say, IBM, when they have debt collection, is that outside debt collector—we'll call it an independent contractor to make it analogous—but clearly an agent of IBM authorized to collect these debts now, just like this case. Can they use IBM letterhead as long as they indicated under their signature, outside counsel, special counsel to IBM for purposes of collection of the debt?

Mr. Conomy: My understanding is that that would not be acceptable under the FDCPA, but here is the difference.

Judge Sutton: Okay.

Mr. Conomy: The state of Ohio is not a corporation. It is a state. And this brings me to my second point. That in order to prevail...

Judge Sutton: Why is that—from the perspective of what's potentially misleading, I'm struggling with why one is misleading and one is accurate.

Mr. Conomy: In this case, the independent-contractor relationship is as irrelevant as the officer-employee distinction because it is the statutory appointment that creates the authority to act. It's, for instance...

Judge Sutton: Are you making a point, then, in the IBM example there's no statute?

Mr. Conomy: There's no statute for IBM to appoint an individual, but, frankly, this is getting a little outside of what I think the important point of this case, from our perspective, is that the state of Ohio is different than a corporation in that in order for the defendants to prevail, they need to manufacture an unwarranted intrusion of federal law into state activity. The state is authorized, pursuant to statute, to appoint people to represent it in whatever manner—the FDCPA cannot regulate how the state appoints individuals to act with the authority of the state.

Judge Gilman: No, but the federal government can define through this Act who is debt collector or not.

Mr. Conomy: Absolutely. And that is irrelevant to the ultimate outcome, which the district court found in the alternative, assuming that they're not officers or employees; they are debt collectors. There's no deception. They are acting on behalf of the state through the Office of the attorney general through their appointment.

Judge Clay: Let me ask you this. What is sought to be accomplished by putting these letters on attorney general letterhead? There must be some advantage to the attorney general in doing that; otherwise he wouldn't ask that that be

done. So what's sought to be accomplished with that?

Mr. Conomy: Certainly there is an advantage, both to the state and to the debtor. Here's the problem. The debtors are claiming that there's a sense of urgency created here. And it is absolutely appropriate because there are remedies available to the state in collection of debts that are not available to IBM or any other private company. Tax refunds can be taken, lottery winnings, casino earnings/winnings can be taken. These are things that private corporations can't do. And it also helps to clarify that, yes, this is from the state. Certainly, we do get a lot of calls; is this real? So the answer is yes.

Judge Clay: So this is to get the debtor to prefer the debt with the state over and above his other debts with private corporations or other debt collectors. The debt to the state, as a result of this, would be made in the minds of many consumers to come first.

Mr. Conomy: If their tax refund is at issue, I think that is a good reason to put it first, and that is not prohibited under the FDCPA. A sense of urgency is not prohibited, but only deception.

Judge Clay: But if the consumer thinks that there's a legal requirement to put that

debt first because it's coming from the attorney general when there is not a legal requirement to put that debt first—if that's the outcome of all this, then it is misleading.

Mr. Conomy: The FDCPA prohibits deception, not confusion. Confusion is not prohibited.

Judge Clay: Well, if you create confusion deliberately to have an advantage over other similarly situated collectors, that may be a problem under the Act.

Mr. Conomy: I have also run out of time, but, again, I'd be happy to respond.

Judge Clay: Well, you can respond. Then Judge Sutton has a question.

Mr. Conomy: Again, it is to the consumer, the debtors, advantage also to respond. They have to prioritize their debt payment if they're getting multiple notices. If their tax refund is at issue in one instance and not in another, I believe they deserve fair warning of that. And that is also part of the reason...

Judge Clay: But that's not what the letter—the letter doesn't tell them that.

Mr. Conomy: It doesn't tell them that they're subject to being arrested...

Judge Clay: So what you—alright. Okay. I think

Judge Sutton has a question.

Mr. Conomy: Yes, your Honor.

Judge Sutton: I'm still not sure I understand your theory of the case. So just let me know if this isn't making sense. I mean, your point about Congress and the FDCPA not interfering with states and how they organize their operations—I guess if I were on their side, I would say, "Well that's taken care of by the exemption." That's—hang in there—so that takes you back to the officer-employee question, but if you don't fit under that, it seems funny to still talk about federal-state. It seems like that's where they address that, and if it doesn't work here, you're back to being like IBM. So now explain to me your answer before why there's a falsity when IBM does it and not the state. So just hear me out. The point I'm making is the letterhead is not a lie. It's not misleading because what's going on is the person is engaged to act as the state, specifically the attorney general, to collect this. I'm sure it's black-letter law and that's why you're conceding it, but you just need to explain it to me. When IBM does it, and everything is exactly the same as here except there's no statute behind all of this, that IBM hires this person at the bottom of their, you know, they

need to make it just like it says, IBM letterhead, CEO, such-and-such—and then you have the signature line, Eric Jones, counsel to IBM for purposes of collecting debts. Why is that misleading? I mean, it is from IBM. They've been hired to be an agent to collect this debt.

Mr. Conomy: I'll concede, for argument, that it may be a violation of the FDCPA.

Judge Sutton: Why? Why? I don't understand why, though. What's misleading about it?

Mr. Conomy: Well, the debtors here are pursuing a theory that the FDCPA permits only one true name. And no matter how many names may be true, only one of them is permitted under the FDCPA to be true.

Judge Sutton: Is there authority for that? I mean, is that in the statute or the regs?

Mr. Conomy: They make an argument based on the use of the singular rather than plural, again, ignoring the Dictionary Act in making that argument. But assuming all that is true, here is my point. Because the state has created a system where more than one name is, in fact, true. Where it is special counsel and the attorney general working pursuant to a statutory arrangement, they're—for them to prevail, they need to create a regulation under the FDCPA that

prohibits the state from using two true names. They're—for them to prevail, it would be a backdoor regulation that would not allow this relationship to be truly disclosed in the letter.

Judge Sutton: Is there case law that says you can't do my hypothetical in the private setting where you have IBM letterhead and it's someone who's not quote "an employee" of IBM; they're a debt collector, but they're an agent for IBM? It's true. This is an IBM debt, and they're collecting it for IBM, and when it's collected, and money's going back to IBM. There's no lie.

Mr. Conomy: There are cases that have used, for instance, a sheriff's letterhead that have been found to violate the FDCPA because the collectors acting for the county in that case did not have the statutory appointment that is at issue here. I—and I'm sorry I don't have that case name at the tip of my tongue right now. I'm pretty sure the debtor's counsel could tell you that case. There is case law that addresses that.

Judge Sutton: I see.

Mr. Conomy: And my point with federalism and I know it's a little convoluted but their application of the FDCPA in this case would prohibit two names from being

true, whereas the statute that allows the appointment for debt collection here...

Judge Sutton: Does the attorney general require this letterhead or not?

Mr. Conomy: The special counsels are directed to use it, yes. Because the state would like people to know when communications are coming from the state.

Judge Gilman: The state law says it's only in connection with tax liability that the letterhead should be used, right?

Mr. Conomy: We don't read that as being a prohibition on other uses. And even if that were the case, if I were to concede that to the debtors in this case, that still does not mean that it is false in violation of the FDCPA.

Judge Sutton: I think the better way to put it is that it would be ambiguous and the attorney general has administrative deference in terms of construing what he can and can't do. And he's decided to say I'm requiring it.

Mr. Conomy: And I would agree wholeheartedly with that. I've gone way over my time. Thank you very much.

Mr. Nobile: Judge Gilman, you had asked earlier about the definition. I'm not going to spend a lot of time on the issue of officer or employee, at least in this

context, whether there was an opinion that actually said that, and we couldn't find anything either, obviously. But we did find the court—the Supreme Court's advisory opinion concerning special counsel, and we've cited that, and I wanted to commend that further to you for further reading and/or review if you haven't already. In which the advisory committee did indicate that special counsel are really just independent contractors. They hold no office and they take no oaths. They act purely at the...

Judge Sutton: Do you have a two-name theory? Is that, is he being fair in characterizing your theory as a two-name theory?

Mr. Nobile: Well I wouldn't call it a two-name theory. I'd call it a true-name theory.

Judge Sutton: Okay, because the two-name or true-name theory runs into the hypothetical I already asked you about where you have the employee with one name and the letterhead having another. So that confirms to me there is no such two-name problem. Right, because you agree if an employee of the office had sent this, we're fine, right?

Mr. Nobile: Right.

Judge Sutton: Okay, so what's—how do you answer the IBM thing? It sounds like there's good authority for you on that.

Explain to me how that authority works and why it is an inaccuracy when the person is an agent and they have authority to collect this debt for their principle. In that respect, is doing everything an employee does, and I just, I just don't get it.

Mr. Nobile: I will answer that, your Honor, but first I want to reinforce and maybe convince you that this letter, these letters, didn't come from Mike DeWine. They didn't come from the attorney general's office. You're struggling with the notion that they did because these are agents or these are somebody who was contracted with to send them on their behalf. It doesn't mean they came directly from the OAG. In fact, they came from the office, the law office, of Eric Jones. That is the business entity that prepared that letter, spent the resources to stuff the envelope, and send that letter out. It did not come from...

Judge Sutton: Yeah but I'm just looking for material falsities is all I'm looking for, and I—what seems to me problematic for your position is I don't see a falsity. To me, it—the A.G. is collecting debts on behalf of the state, and the A.G. can do that through employees, the A.G. can do it only by himself, or the A.G. can do some combination,

including outside counsel where outside counsel are agents of the A.G. for purposes of collecting that debt. So, I just don't get the falsity. The principle in every setting is either the A.G. or the state, however you want to look at it. And so why is that false? I mean, to the extent the anxiety created in the recipient is "Ah, this is coming from the state. This is coming from the attorney general." That's right. It is. That's not a lie. That's where it's coming from. That's where the money's going back.

Mr. Nobile: That's actually—the money doesn't go back to the OAG.

Judge Sutton: Not all of it. Not all. Well, some of it goes to state and some of it goes to the individual.

Mr. Nobile: But, your Honor, that's true with any debt collector in a contingency relationship.

Judge Sutton: Then show me this case that shows why my IBM hypothetical—because I think that's your best response—just tell me the cases that say, "No, no, no. You can't have IBM letterhead, an outside debt collector, and signing Eric Jones, counsel or whatever, agent for IBM and collecting debts.

Mr. Nobile: (inaudible), *Boyco*, I'm trying to think of...

Judge Do they respond to the point? I'll read

Sutton: those cases. Do they respond to the point that there's not a falsity because the person really is an agent for IBM or the A.G. in collecting this debt.

Mr. Nobile: They will tell you that one party, an individual, or a business has a true name, and if you are collecting outside of that true name, then you are violating that part of the...

Judge Sutton: The true name is the A.G. or the IBM. No one's denying the true name.

Mr. Nobile: No. The true name of the debt collector. It's not the creditor...

Judge Sutton: It's back to two names and that proves Mike DeWine cannot even do this with employees because you're going to have two names on those letters. You're going to have the letterhead with DeWine, and you're going to have the employee's name, Pat Smith, whatever it is.

Mr. Nobile: Doesn't that really explain why, under the statute, they accept officer and employees? It doesn't say agents. It just says officers or employees, not agents. So if an employee actually signs it, there is no FDCPA problem. There is no reason to question whether or not it came from a name other than the true name because the FDCPA doesn't apply. Same thing if Mike DeWine penned the letter. It doesn't apply. An agent, however, it

applies. And you have to be clear. You wrote, your Honor, in less than a month ago that simply because something is—well—a truth doesn't necessarily mean it doesn't mislead. And you wrote that in your *Buchanan* decision. I think it came out last month. In this case there might be some truth to the relationship. Nobody's denying that. They're hired. There's a contract. But it doesn't mean that they're the ones that created this letter that, they put it on the letterhead of the state. The individual that receives that thinks that...

Judge Sutton: What about the fact they had no choice?

Mr. Nobile: Well, errors in legal judgment, the Supreme Court's ruled, and I think this court's preceded the Supreme Court ruling, that way, are not defenses under the statute

Judge Sutton: So the attorney general can't say, "I want this all on letterhead?" Because that's the ultimate upshot of your position.

Mr. Nobile: Your Honor, even the state law says you can't do that except for tax debts.

Judge Sutton: No, no. I mean. It just says for tax, it doesn't say the opposite.

Mr. Nobile: It says {crosstalk}...

Judge Sutton:	You have to agree there's ambiguity there.
Mr. Nobile:	Well, I don't see it as ambiguous because it—there's a directive that special counsel shall use the letterhead but only in connection with collection of tax debts. To me, that's very clear. That's ...
Judge Sutton:	Your theory of the case, then, would be that's it's okay in tax settings to do just this thing.
Mr. Nobile:	Yes because taxes are not debts under the FDCPA. I think that's probably—without digging too deeply—just an educated guess there would be that's why that exists. They want the advantage of being able to use the debt-collectors letterhead.
Judge Clay:	You've ran way over you're...
Mr. Nobile	I'm sorry, Your Honor.
Judge Clay:	I guess we should wrap this up.
Mr. Nobile	Thank you.
Judge Clay:	The case is submitted. You may call the next...

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In the Supreme Court of the United States

MARK J. SHERIFF, SARAH SHERIFF, WILES, BOYLE, BURKHOLDER & BRINGARDNER CO., LPA, AND MICHAEL DEWINE, ATTORNEY GENERAL OF OHIO,

Petitioners,

v.

PAMELA GILLIE AND HAZEL MEADOWS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

This case asks whether Congress, through the Fair Debt Collection Practices Act, meant to interfere with the way in which a State engages in a sovereign function—its debt collection. Ohio requires its Attorney General to collect debts owed to the State. It authorizes the Attorney General to "appoint special counsel," in addition to employees, "to represent the state in connection with" this debt collection. The law requires that the Attorney General give special counsel the office's letterhead for use in collecting tax debts, and the Attorney General has read the law as giving him discretion over whether those counsel use that letterhead for other debts owed to the State.

The Fair Debt Collection Practices Act bars "debt collectors" from "us[ing] any false, deceptive, or misleading representation or means," 15 U.S.C. § 1692e, but expressly does not apply to "any officer or employee" of a "State to the extent that collecting or attempting to collect any debt is in the performance of his official duties," *id.* § 1692a(6)(C). In this case, a divided Sixth Circuit held that special counsel do not qualify for this state exemption and that a jury could find their use of state letterhead "misleading."

The case presents two questions:

1. Are special counsel—lawyers appointed by the Attorney General to undertake his duty to collect debts owed to the State—state "officers" within the meaning of 15 U.S.C. § 1692a(6)(C)?

2. Is it materially misleading under 15 U.S.C. § 1692e for special counsel to use Attorney General letterhead to convey that they are collecting debts owed to the State on behalf of the Attorney General?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Plaintiffs-Appellants below (and Respondents here) are Pamela Gillie and Hazel Meadows.

Defendants-Appellees below (and the Petitioners joining this Petition) are Mark J. Sheriff, Sarah Sheriff, and Wiles, Boyle, Burkholder & Bringardner Co., LPA. Defendant-Appellee Wiles, Boyle, Burkholder & Bringardner Co., LPA, has no parent company, and no publicly held company owns 10% or more of it.

Ohio Attorney General Michael DeWine (also a Petitioner) successfully moved to intervene in the district court as an Intervenor-Defendant, and was an Appellee in the Sixth Circuit.

Eric A. Jones and the Law Office of Eric A. Jones, LLC, were also Defendants-Appellees below.

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OPINIONS BELOW

The Sixth Circuit's denial of en banc review, Pet. App. 1a-17a, is unpublished. Its decision, Pet. App. 18a-76a, is published at 785 F.3d 1091. The district court's decision, Pet. App. 77a-101a, is published at 37 F. Supp. 3d 928.

JURISDICTION

On May 8, 2015, the Sixth Circuit issued its decision. On July 14, 2015, it denied petitions for rehearing en banc. Petitioners timely filed a petition for certiorari on September 15, 2015. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fair Debt Collection Practices Act (referred to in this brief as the "Act"), Pub. L. No. 95-109, 91 Stat. 874 (1977), is codified as amended at 15 U.S.C. §§ 1692-1692p. It defines "debt collector" to exclude "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." *Id.* § 1692a(6)(C). It prohibits debt collectors from engaging in "any false, deceptive, or misleading representation or means in connection with the collection of any debt." *Id.* § 1692e. This brief's appendix includes relevant sections of the Act.

STATEMENT OF THE CASE

A. The States' Prerogatives Regarding Debts Have Long Been Viewed As An Important Aspect Of Their Sovereignty

"From the founding, the States have taken debts—whether owed by them or to them—seriously." Pet. App. 55a (Sutton, J., dissenting).

For debts owed *by* States, sovereign immunity has granted them "the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith." *The Federalist* No. 81, p.487 (Alexander Hamilton) (C. Rossiter ed., 2003). For debts owed *to* States, many sovereign privileges have historically accompanied their debt-collection efforts.

As one example, "there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1856). Magna Carta took this right as a given, demanding only that the crown seek goods ahead of lands. Magna Carta, ch. 8, *in* 1 Edward Coke, *The Second Part of the Institutes of the Laws of England* 18 (1797). Similar debt-collection methods were replicated "in the laws of the various American colonies and, after independence, the States." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 30 (1991) (Scalia, J., concurring in judgment); *Phillips v. Comm'r of Internal Revenue*, 283 U.S. 589, 595 & n.5 (1931). This Court upheld these summary procedures as applied against a U.S. revenue receiver. *Murray's Lessee*, 59 U.S. at 276-80.

As a second example, the crown viewed it as a sovereign "prerogative" to have its "debt paid before the debt of any subject." *Sir Edward Coke's Case*, 78 Eng. Rep. 169, 169-70 (Ct. of Wards 1624); 3 William Blackstone, *Commentaries on the Laws of England* 420 (1768). Many States "succeeded to [this] prerogative right" of priority under their common law. *U.S. Fid. & Guar. Co. v. Bramwell*, 217 P 332, 336 (Or.

1923); *Aetna Accident & Liab. Co. v. Miller*, 170 P 760, 760-63 (Mont. 1918). This Court enforced the right against "property in the hands of a receiver appointed by a federal court." *Marshall v. New York*, 254 U.S. 380, 385 (1920).

As a third example, in perhaps the earliest use of the "clear-statement rule," courts refused to interpret general bankruptcy laws as discharging debts owed to the crown. *Anon.*, 26 Eng. Rep. 167 (Ch. 1745); *Rex v. Pixley*, 145 Eng. Rep. 647 (Exch. 1726). States invoked the same rule—that the "sovereign" was not "named" and so "not bound"—when construing early bankruptcy laws as not discharging state debts. *Commonwealth v. Hutchinson*, 10 Pa. 466, 468 (1849); *State v. Shelton*, 47 Conn. 400, 404-07 (1879); *cf. United States v. Herron*, 87 U.S. 251, 263 (1873). While bankruptcy laws now discharge some state debts, *Ohio v. Kovacs*, 469 U.S. 274, 278 (1985), this Court's cases illustrate that the clear-statement rule lives on in the bankruptcy context, *Kelly v. Robinson*, 479 U.S. 36, 47-49 (1986).

The aspect of sovereignty at issue here is more basic, but no less important, than these privileges. This case does not ask whether a State may seize property, demand payment first, or prevent a debt's discharge. It asks only whether a State may *notify* debtors that they owe state debts and that the counsel collecting the debts acts for the State's chief debt collector—its Attorney General. Treating a State's interest in its debt-collection methods as a "policy" concern, the Sixth Circuit held that special counsel to Ohio's Attorney General could not convey that they sent letters for the Attorney General without risking liability under the Act. Pet. App. 38a.

B. Ohio Has Long Delegated The Duty To Collect Debts To Its Attorney General

1. *Ohio Attorney General.* In 1846, Ohio passed a law "[t]o create the office of Attorney General, and to prescribe his duties." 44 Ohio Laws 45, 46 (1846). Ohio has since directed the Attorney General to represent "the state and all its departments" in court. Ohio Rev. Code § 109.02.

From the office's creation until today, the Attorney General has relied on "special" counsel to perform this duty. In the 1800s, the Attorney General had one employee, but could hire "local counsel" to assist in civil actions. Rev. Stats. of Ohio § 202 (Clarke & Co. 1891); 73 Ohio Laws 189, 191 (1876). By the 1900s, Ohio authorized the Attorney General to appoint three lawyers to permanent posts, but again gave the Attorney General broad "power to employ special counsel." 97 Ohio Laws 59, 60 (1904). Only later did the Attorney General obtain general authority to hire "assistant attorneys general." 114 Ohio Laws 53, 53 (1931).

Today, Ohio authorizes the Attorney General to employ assistant attorneys general, Ohio Rev. Code § 109.03, or to "appoint special counsel to represent the state in civil actions, criminal prosecutions, or other proceedings in which the state is a party or directly interested," *id.* § 109.07. Specific statutes reinforce that the Attorney General may choose between assistant attorneys general and special counsel. *See, e.g., id.* §§ 109.81 (antitrust); 109.84 (workers compensation); 119.10 (administrative proceedings); 2743.14 (court of claims). Ohio's civil-service laws thus identify special counsel alongside assistant attorneys general as in the "unclassified" "civil ser-

vice of the state." *Id.* § 124.11(A)(11). They define "civil service of the state" to include "all offices and positions of trust or employment with the government." *Id.* § 124.01(K).

2. *Debt-Collection Duties.* Since 1846, Ohio has authorized the Attorney General to sue those "owing debts to the state." 44 Ohio Laws at 47 The Attorney General retains this duty today. Ohio Rev. Code § 131.02(A)-(C). State debts can range from tax debts, to educational debts owed to state colleges, to medical debts owed to state hospitals. J.A. 92, 112.

Ohio employs a three-step process to collect debts. At step one, the state creditor attempts to collect for 45 days. Ohio Rev. Code § 131.02(A). At step two, the creditor certifies the debt to the Attorney General. *Id.* At step three, if the Attorney General concludes that the debt has become an "uncollectible" or "final overdue claim," the State may release or sell the debt. *Id.* §§ 131.02(F)(1), 131.022(B).

At the second step, after a debt has been certified, "[t]he attorney general shall give immediate notice by mail or otherwise to the party indebted of the nature and amount of the indebtedness." *Id.* § 131.02(B)(1). The Attorney General must "collect the claim or secure a judgment and issue an execution for its collection." *Id.* § 131.02(C). Attorneys General have undertaken these tasks through internal and external collectors, and through both assistant attorneys general and special counsel. *See* J.A. 95-100. Since 1937, Ohio has allowed the Attorney General to "appoint special counsel to represent the state" in connection with debts "certified to the attorney general," and to pay special counsel from the recovered funds. Ohio Rev. Code § 109.08; 117 Ohio

Laws 304, 304-05 (1937). This debt-collection duty requires significant effort. To put it in perspective, from July 2011 to June 2012, the office collected over $466 million—$191 million of which came through special counsel. J.A. 100.

This case concerns special counsel's use of Attorney General letterhead. In 1989, Ohio passed tax legislation "popularly referred to as the Ohio Taxpayers' Bill of Rights." Anthony L. Ehler & Randall A. Osipow, *Am. Sub. S.B. 147: Ohio Taxpayers' Bill of Rights*, 3.5 Ohio Tax Review 10, 10 (Sept./Oct. 1989). The law granted taxpayers rights against the State. 143 Ohio Laws 877, 879-86 (1989). As relevant here, one section directed the Attorney General to "provide to the special counsel appointed to represent the state in connection with [tax] claims the official letterhead stationery of the attorney general." *Id.* at 877 (codified at Ohio Rev. Code § 109.08). It *required* special counsel to "use the letterhead stationery, but only in connection with the collection of such claims arising out of those taxes." *Id.* The next section directed the Attorney General to appoint "problem resolution officers" to handle concerns from tax debtors about the employee or "special counsel assigned to the case." *Id.* at 877-78 (codified at Ohio Rev. Code § 109.082).

The Attorney General's Office has interpreted Ohio Rev. Code § 109.08—that special counsel "shall" use the letterhead for tax debts, but only with respect to those debts—as commanding counsel to use the letterhead for tax debts, but leaving it to the Attorney General to decide whether they use it for other state debts. The office has likewise interpreted Ohio Rev. Code § 109.082—that problem resolution

officers "shall" handle tax-debt concerns—as requiring them to handle tax complaints, but leaving it to the Attorney General to allow them to handle other inquiries. Plaintiffs "categorically deny" challenging this interpretation of state law, which the office believes to be longstanding. *See* J.A. 114.

3. *Retention Agreements.* During the relevant period, special counsel applied for one-year retention agreements with the Attorney General. J.A. 142, 171. The agreements addressed special counsel's interactions with the office and with debtors.

As for special counsel's relationship with the office, it appointed them "to provide legal services on behalf of the Attorney General to assist in the collection of past due debt." J.A. 173. Special counsel were independent contractors; they bought their own insurance, paid their own expenses, and hired their own employees. J.A. 172-73, 189-90, 193-94. Yet the office generally oversaw their collection. It assigned claims to them. J.A. 173-74. Before suing or settling, counsel had to obtain the office's approval. J.A. 179. Special counsel also had to follow various policies for protecting confidential information, preserving records, and interacting with debtors, and they remained subject to periodic audits. J.A. 177-78, 191-93, 388; *see* J.A. 97-101.

As for special counsel's dealings with debtors, the contracts required special counsel, "[i]n all pleadings, notices and/or correspondence," to indicate that the document was "prepared by the Special Counsel in its position as Special Counsel for the Attorney General." J.A. 173. The Attorney General's Office "expect[ed] Special Counsel to provide services to the public in a manner that will preserve or enhance

goodwill between the public and the State," and had "zero tolerance" for actions demonstrating "less than complete respect for the rights and reasonable expectations of the public." J.A. 193. Accordingly, special counsel had to follow "the same standards of behavior as set forth in" the Act. J.A. 194.

C. The District Court Rejected Plaintiffs' Claims That Special Counsel's Use Of State Letterhead Violated The Act

1. In 2012, Mark Sheriff, an attorney with Wiles, Boyle, Burkholder & Bringardner Co., LPA, was one special counsel. J.A. 387 In earlier years, Bruce Burkholder had been special counsel at Wiles. *Id.* In 2007, Burkholder filed suit against Plaintiff Hazel Meadows, a University of Akron graduate, to recover a university debt. J.A. 388. Meadows agreed in a judgment entry signed by her attorney to make monthly payments. J.A. 389-90. She paid for several years. J.A. 385.

In July 2012, Sarah Sheriff, a Wiles employee, fielded a call from Meadows "ask[ing] [Sheriff] for her balance." J.A. 385. Sheriff sent a letter identifying the balance. Pet. App. 17a. The letterhead identified the office's Collections Enforcement Section. *Id.* The body read: "Per your request, this is a letter with the current balance owed for your University of Akron loan that has been placed with the Ohio Attorney General. Feel free to contact me should you have any further questions." *Id.* Sarah Sheriff signed the letter; under her name was the law-firm name and address; under the address was the notation "Special Counsel to the Attorney General." *Id.* Because the letter merely responded to Meadows,

Sheriff did not think it mattered that she signed the letter rather than Mark Sheriff. J.A. 385.

"Though the letter said that it was in response to [Meadows's] request for information," Meadows did not "recall ever asking anyone for any information about this matter." J.A. 139. The letter allegedly "scared [her] because [she] thought that the Ohio Attorney General might charge [her] with a crime for not paying what he said [she] owed." *Id.* She took the letter to her attorney, and says she sought counseling. J.A. 139-40.

2. Eric Jones has served as special counsel since 2007 J.A. 207 On May 24, 2012, he sent Plaintiff Pamela Gillie a letter on the primary Attorney General letterhead. Pet. App. 14a. The letter included a "balance." Its body said: "You have chosen to ignore repeated attempts to resolving the referenced medical claim. If you cannot make immediate payment call DENISE HALL at Eric A. Jones, L.L.C., to make arrangement to pay this debt." *Id.* Jones signed the letter as "Outside Counsel for the Attorney General's Office." *Id.* He listed his return address on the bottom. *Id.*

Gillie alleged that she was confused about why Jones sent a letter for the Attorney General, and thought it might be a scam because it asked to send money to a law firm. J.A. 136. Having filed for bankruptcy, she allegedly feared that "the Attorney General might garnish my wages" or "somehow stop or delay my bankruptcy case." J.A. 137 She, too, contacted her attorney. *Id.*

3. Plaintiffs brought suit against Mark Sheriff, Sarah Sheriff, and Wiles, and Eric Jones and his firm

alleging violations of 15 U.S.C. § 1692e. J.A. 35-58. Their five-count complaint asserted that special counsel's use of state letterhead: (1) falsely represented that special counsel were affiliated with the Attorney General under § 1692e(1); (2) simulated letters authorized by the Attorney General under § 1692e(9); (3) falsely indicated that the Attorney General was the primary party involved in the collection in violation of § 1692e(10); (4) used a name that was not special counsel's "true name" in violation of § 1692e(14); and (5) alternatively, made special counsel's law-firm names not their "true names," causing those names to violate § 1692e(14). J.A. 53-56.

The district court granted the Attorney General's motion to intervene, and bifurcated proceedings by initially deciding whether special counsel were "debt collectors" and whether their use of state letterhead was misleading. D.Ct. Doc.42, Order, PageID#480-84.

After both sides moved for summary judgment, the court ruled for special counsel. Pet. App. 78a. *First*, it found that special counsel were not debt collectors because they fell within 15 U.S.C. § 1692a(6)(C)'s exemption for government "officers or employees." Pet. App. 84a-90a. The Dictionary Act defines "officer" as "'any person authorized by law to perform the duties of the office.'" Pet. App. 87a (quoting 1 U.S.C. § 1). This definition applied, the court held, because the Attorney General bore the duty to collect state debts, and a statute authorized special counsel to assist him. *Id.*

Second, the court found nothing "misleading" about special counsel's use of state letterhead. Pet. App. 90a-98a. It held that "[t]he letters accurately

reflect [the] relationship" of special counsel to the Attorney General. Pet. App. 96a. It added that the letter from Sarah Sheriff "require[d] additional analysis" because she was not special counsel. *Id.* Since the letter merely responded to an inquiry and was not otherwise inaccurate, the court held, it was not "materially misleading." Pet. App. 97a.

D. The Sixth Circuit Reversed

1. The Sixth Circuit remanded for trial. Starting with the state "officer" exemption, it held that special counsel were not "authorized by law" to perform "the duties of the office." Pet. App. 28a-44a. The court stated that a contract, not a law. gave special counsel authority to collect debts. Pet. App. 32a-33a. While Ohio Revised Code § 109.08 authorized the Attorney General to appoint them, the court construed "authorized by law" to reach only laws immediately authorizing conduct. *Id.* It also read "the duties of the office" to require an appointee to be able to perform *all* duties of the office, not just *some*. Pet. App. 35a.

The court added three general points about this exemption. It cited cases holding that independent contractors were not "officers." Pet. App. 36a-38a. It rejected reliance on the "clear-statement rule" from *Gregory v. Ashcroft*, 501 U.S. 452 (1991), because "[t]his case is about third-party debt collectors." Pet. App. 39a. And it suggested that special counsel were not "officers" under Ohio law. Pet. App. 39a-42a.

Turning to the merits, the court stated that the Act bars statements that could "confuse the least sophisticated consumer." Pet. App. 46a. Under this standard, the court held, a jury could find that special counsel's use of state letterhead violated

§ 1692e(9) and (14), the provisions that Plaintiffs cited on appeal. Pet. App. 47a-54a. "The presence of the authoritative symbols at the top of the letter immediately signals to the debtor that it is the State of Ohio that is threatening to take action against her." Pet. App. 49a. And while the signature clarified that the sender was "outside" or "special" counsel, "[t]he independent debt collector may have achieved his desired impact at the point when the letter is opened and the least sophisticated consumer perceives the name of the Attorney General." Pet. App. 50a.

2. Judge Sutton dissented. He noted that special counsel fit the officer definition "to a tee." Pet. App. 57a. A law authorized counsel to collect debts for the Attorney General, and debt collection was an official duty. *Id.* The word "officer" was at least ambiguous, but "[w]hen Congress purports to regulate core state functions, it must do so unambiguously." Pet. App. 58a.

On the merits, the dissent found nothing misleading about the letters. Pet. App. 63a-70a. "[S]pecial counsel are no different from assistant attorneys general paid to recover the State's money." Pet. App. 64a. Their use of Attorney General letterhead does not falsely imply that the letters came from the Attorney General, because the "letters *do* come from the Attorney General." Pet. App. 65a.

3. The Sixth Circuit denied rehearing en banc. Judge Clay's concurrence noted that the letterhead could mislead debtors "into believing that [they were] being contacted directly by the attorney general's office rather than debt collection attorneys," which could intimidate them "into promptly paying the debt

out of fear that that the attorney general might take punitive action against them." Pet. App. 3a.

Judge Sutton—joined by Judges Boggs, Batchelder, Cook, and McKeague—made several additional points in dissent. Pet. App. 7a-11a. "How these letters could be misleading is beyond me," he noted, given that counsel sent the letters for the Attorney General. Pet. App. 8a. He added that "special counsel face potential liability coming and going" because "recipients will assume that the letter[s] do[] *not* concern a state debt" if counsel use private letterhead. Pet. App. 9a. And he reiterated that the "officer" exception applies because the case "implicates foundational federalism concerns." *Id.*

SUMMARY OF ARGUMENT

The Court should reverse the decision below because (1) special counsel are state "officers" under 15 U.S.C. § 1692a(6)(C), and (2) their use of Attorney General letterhead accurately conveyed that they acted for the office under 15 U.S.C. § 1692e.

I.A. As courts have recognized, "officer" has a range of meanings. In a narrow sense, it covers those that must be appointed through the methods outlined by the Constitution's Appointments Clause. In a broader sense, it reaches those authorized to perform public duties. For two reasons, the Court should read the Act as adopting the broad definition.

The Act does not define "officer," and so triggers the Dictionary Act's broad default definition. Dating to 1871, this definition states that "officer" "includes any person authorized by law to perform the duties of the office." The definition's introductory words convey an expansive reach. Its use of the phrase

"authorized by law" conveys that a position must be "empowered" via an "enactment" rather than just a contract. And its use of the phrase "the duties of the office" conveys that the position must undertake "public" or "sovereign" duties.

The Act's context confirms this broad definition. As a specific matter, its text shows a healthy respect for federalism, ranging from its broad exemption for both officers and employees, to its inclusion of municipalities within that exemption, to its exclusion of tax debts. As a general matter, the Act's subject triggers this Court's "clear-statement rule." Under that rule, the exemption should be read broadly so that the Act does not interfere with a State's debt collection.

B. Special counsel meet the "officer" definition. Their position is "authorized by law." Ohio law has long empowered Ohio's Attorneys General to appoint special counsel for their debt-collection duty. Ohio law also fixes special counsel's method of payment: They are paid out of the claims they recover, a historically common practice. And because Ohio law does not identify special counsel's tenure, they serve at the pleasure of their appointing officer.

Special counsel's duties qualify as "sovereign." Courts have long viewed the traditional function of attorneys general—representing the sovereign in court—as a "sovereign" duty. The year before Congress passed the Act, this Court held that *constitutional* officers must conduct civil litigation for the federal government to vindicate public rights. The types of claims at issue reinforce that special counsel perform sovereign duties. Persons handling public funds have long been treated as officers.

At the least, the Court may reasonably read the exemption as covering special counsel. The clear-statement rule thus compels a ruling in their favor.

C. The Sixth Circuit mistakenly reached the contrary result. *First*, it read the "officer" definition too narrowly. It said that special counsel were not "authorized by law" even though a statute authorizes the position. And it said that, to be officers, special counsel would have to perform "all" duties of the Attorney General's Office even though the definition lacks the word "all." *Second*, the Sixth Circuit's narrow view of the clear-statement rule (as limited to laws affecting state structure) conflicts with this Court's broad use of it. *Third*, the Sixth Circuit placed undue weight on special counsel's status as independent contractors, both because the Act reaches "officers" *and* "employees" and because not all officers have historically been traditional employees. *Fourth*, the Sixth Circuit mistakenly relied on Ohio's state-law definitions. This case concerns the meaning of a federal statute. Regardless, the Sixth Circuit wrongly suggested that special counsel *categorically* are not officers under state law; they are, for example, officers under Ohio's public-records laws.

II. Special counsel's use of Attorney General letterhead comported with 15 U.S.C. § 1692e(9) and (14), the provisions on which Plaintiffs relied below.

A. Section 1692e bans "false, deceptive, or misleading" communications, and identifies sixteen prohibited practices. To violate § 1692e, a communication must initially be capable of leading consumers to believe an "untruth." To assess whether a communication may do so in other contexts, courts have adopted an objective test tied to an "average" person

in the intended audience. That test best balances this Act's competing goals. A focus on average *consumers*—the intended audience—recognizes that the audience receiving debt-collection letters will often be unsophisticated. And a focus on *average* consumers protects conscientious debt collectors from unreasonable misinterpretations. By comparison, the courts adopting the "least-sophisticated consumer" standard do not apply that standard in practice and created it from whole cloth.

To violate § 1692e, a communication must also be capable of leading consumers "astray in [their] action or conduct," i.e., it must be material. Materiality is an ordinary element of claims based on misleading statements—as evidenced by its use under the Federal Trade Commission Act and by the circuit agreement that it applies under this Act.

Section 1692e's subsections reinforce these standards. They ban practices (like impersonating an official) that could materially mislead average consumers. The two prohibitions on which Plaintiffs relied below illustrate as much. The first (§ 1692e(9)) bars debt collectors from using written communications that "simulate," or "falsely represent" to be, documents authorized, approved, or issued by the government. In other words, it bars debt collectors from pretending to act for the government. The second (§ 1692e(14)) prohibits debt collectors from using names that are not their "true name." In other words, it prohibits them from using pseudonyms.

B. Special counsel's use of Attorney General letterhead could not lead any consumer to believe a material falsehood. The letterhead accurately conveys that the letters were sent for the organization identi-

fied (the Attorney General's Office). The letterhead did not violate § 1692e(9) by "falsely representing" or "simulating" that it was authorized by the office; it was, in truth, *required* by that office. And the letterhead did not violate § 1692e(14) because special counsel *do* use a "true name" when they invoke the office's name to collect state debts.

C. The Sixth Circuit wrongly held the opposite. *First*, it noted that the letterhead might lead consumers to believe that the Attorney General *personally* sent the letters. But the letters' signatures show that he did not. *Second*, it noted that the letterhead might lead consumers to believe that the letters were sent by the office. But special counsel *do* act for the office. That they are independent contractors does not change that fact; they have the same general authority as assistant attorneys general to collect state debts. *Third*, it noted that consumers have asked the office whether the letters are authentic. But the office says "yes" in response. And if this suit requires special counsel to remove that letterhead, consumers might not know to call the office with concerns. *Fourth*, it said that the letterhead was intimidating. But § 1692e prohibits debt collectors from deceiving debtors, not from making accurate representations that some might find intimidating. And state creditors *do* have authority that private creditors do not—such as the ability to take income-tax refunds. *Fifth*, it noted that Sarah Sheriff was not special counsel. But that letter-specific issue conflicts with the complaints' class-based counts, and is immaterial.

ARGUMENT

I. THE ACT'S GOVERNMENT "OFFICER" EXEMPTION COVERS SPECIAL COUNSEL

The Act regulates "debt collector[s]," a term that excludes "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." 15 U.S.C. § 1692a(6)(C). The word "officer" in this exemption covers positions, like special counsel, that are statutorily empowered to litigate claims for state debts on an Attorney General's behalf. The Sixth Circuit's contrary view conflicts with the Act's text, with our nation's history, and with basic constitutional principles.

A. The "Officer" Exemption Covers Positions Statutorily Empowered To Litigate Claims For A State

More so than other words, "officer" is, to quote Judge Hand, a "chameleon[]" that "reflect[s] the color of [its] environment." *Comm'r v. Nat'l Carbide Corp.*, 167 F.2d 304, 306 (2d Cir. 1948). For years, courts have recognized that, "'as used in certain statutes or constitutional provisions,'" it "'may include certain positions, places, and persons, which would not be embraced within the meaning of the same word[]'" in other provisions. *Gerald v. Walker*, 78 So. 856, 858 (Ala. 1918) (citation omitted).

A perusal of the U.S. Code bears this out. At times, federal laws may convey a stricter meaning for "officer," one limited to positions falling within the Appointments Clause. U.S. Const. art. II, § 2, cl. 2. The Court has sometimes read "officer" this way in the criminal context where the rule of lenity looms

large. *United States v. Germaine*, 99 U.S. 508, 509-11 (1878). Other times, laws may expressly define "officer" for particular purposes, as in Title 5 (federal personnel) or Title 10 (the military). 5 U.S.C. § 2104; 10 U.S.C. § 101(b)(1). Still other times, laws may "use[] the word 'officer' in a less strict sense," one that conveys a "more popular signification." *United States v. Hendee*, 124 U.S. 309, 313 (1888). In this broader sense, "officer" has long meant any "person commissioned or authorized to perform any public duty." 2 Noah Webster, *An American Dictionary of the English Language* (1828).

The Act does not define "officer," but two factors show that it has a broad meaning encompassing all positions statutorily empowered to litigate claims for a State: (1) its silence triggers the Dictionary Act's expansive default definition; (2) its context reinforces that the word sweeps broadly.

1. The Dictionary Act defines "officer" to include positions statutorily empowered to perform sovereign duties

The Dictionary Act states that, "unless the context indicates otherwise," "officer" "includes any person authorized by law to perform the duties of the office." 1 U.S.C. § 1. This definition dates to 1871, making its meaning at that time relevant. Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431 (noting that "the reference to any officer shall include any person authorized by law to perform the duties of such office, unless the context shows that such words were intended to be used in a more limited sense"). The definition's three parts show a broad reach.

Includes Any Person. The definition starts with two clues signaling expansive coverage. It "is introduced with the verb 'includes' instead of 'means.'" *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2170 (2012). That verb makes the definition "more susceptible to extension of meaning." *Burgess v. United States*, 553 U.S. 124, 131 n.3 (2008) (citation omitted). It also covers "any" person satisfying its elements. That adjective, too, has "an expansive meaning." *United States v. Gonzales*, 520 U.S. 1, 5 (1997). These word choices direct courts not to give a cramped reading to the elements that follow.

Authorized By Law. The definition requires a person's position to be "authorized by law." This means that an enactment ("law") has empowered ("authorized") the person's actions. 1 *The Century Dictionary & Cyclopedia* 387 (1897) (defining "authorize" as "[t]o give authority, warrant, or legal power to; empower (a person)"); *Black's Law Dictionary* 691 (1st ed. 1891) (defining "law" as "enactment; a distinct and complete act of positive law"). Under this text, a law need only sanction a position; it need not specify all of the particulars.

The 1871 legal backdrop confirms that a law could generally create an officer position, while leaving it to a superior to fill in its details. Where, for example, a law allowed an assistant treasurer to appoint "clerks" without specifying their duties, this Court held that a clerk was an officer under a criminal law (and the Appointments Clause). *United States v. Hartwell*, 73 U.S. 385, 393 (1867). Likewise, where a law did not specify the pay due to a deputy sheriff, a sheriff could contract with the deputy regarding pay. Floyd Mechem, *A Treatise on the*

Law of Public Offices and Officers § 379, p.250 (1890). And where a law did not fix the officer's term, it created an at-will position. *Id.* § 445, p.284.

Duties Of The Office. The definition requires a person "to perform the duties of the office." In 1871, a public "office" had an established meaning. It was "the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual [was] invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public." *Id.* § 1, pp.1-2. As one case noted, the "essence of [a public office] is, the duty of performing an agency, that is, of doing some act or acts, or series of acts for the State." *Clark v. Stanley*, 66 N.C. 59, 63 (1872). As another said, "[w]hether we look into the dictionary of our language, the terms of politics, or the diction of common life, we find that whoever has a public charge or employment, or even a particular employment affecting the public, is said to hold or be in office." *Rowland v. Mayor of N.Y.*, 83 N.Y. 372, 376 (1881).

In 1871, moreover, there was "'no very clear conception of a professional office'" in which a person "'devote[d] his entire time to the discharge of public functions.'" *Filarsky v. Delia*, 132 S. Ct. 1657, 1662 (2012) (citation omitted) (interpreting 42 U.S.C. § 1983). To determine whether an individual was an "officer," therefore, courts often applied a *functional* approach (one examining "the nature of the functions to be performed"), not a *formalistic* approach (one examining "the presence or absence of an official designation"). *State ex rel. Clyatt v. Hocker*, 22 So. 721,

722 (Fla. 1897); *State ex rel. Att'y General v. Kennon*, 7 Ohio St. 546, 557-58 (1857). And "[t]he most important characteristic which distinguishe[d] an office from an employment or contract [was] that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government." Mechem, *supra*, § 4, p.5.

Examples flesh out this "sovereignty" divide. On one hand, litigating state interests was considered a sovereign duty, one associated with attorneys general. *See Buckley v. Valeo*, 424 U.S. 1, 139 (1976); *People v. Miner*, 2 Lans. 396, 398 (N.Y. Sup. Ct. 1868). Sovereign functions also included handling public money—either receiving it, *Commonwealth v. Evans*, 74 Pa. 124, 139 (1874), or spending it, *United States v. Maurice*, 26 F. Cas. 1211, 1214-15 (C.C.D. Va. 1823) (Marshall, J.). On the other hand, a surgeon who examined patients seeking public pensions was not an "officer" given "the nature of [his] employment." *Germaine*, 99 U.S. at 512. And a person preserving timber on public lands was not an officer because his tasks were "not essentially different from" those of "a contractor to build a state house." *Opinion of the Justices*, 3 Me. 481, 483 (1822).

In sum, the Dictionary Act codified the historically broad meaning of "officer," one that reached all persons legally authorized to perform public duties. Unless the Act's specific context proves otherwise, this definition applies here.

2. Context confirms that the Act adopts a broad "officer" definition

Far from proving otherwise, the Act's context—both its text and more general principles—reinforces that it adopts a broad "officer" definition.

The Act's Text. The exemption conveys a broad reach. It expansively exempts *both* officers *and* employees with "official" debt-collection duties. 15 U.S.C. § 1692a(6)(C). In other contexts, the phrase *federal* "officer or employee" has been read broadly to cover a D.C. jail superintendent required to keep federal prisoners, *Reid v. Covert*, 351 U.S. 487, 489-90 (1956), *rev'd on other grounds* 354 U.S. 1 (1957) (former jurisdictional statute), a deputized local police officer, *United States v. Luna*, 649 F.3d 91, 101 (1st Cir. 2011) (18 U.S.C. § 111), or an "intermittent consultant or adviser to a department or agency of the Government," *Conflict-of-Interest Statutes*, 42 Op. Att'y Gen. 111, 111 (1962) (former conflict-of-interest laws). Courts have also read "official duties" broadly to cover actions taken as part of an individual's duties, whether assigned by a statute or superior. *See United States v. Drapeau*, 644 F.3d 646, 652-53 (8th Cir. 2011) (18 U.S.C. § 111); *Heredia v. Green*, 667 F.2d 392, 395-96 (3d Cir. 1981) (the Act).

When read as a whole, § 1692a reiterates that the Act steers clear of state functions, reinforcing that "officer" should be read that way too. The definition of "debt collector," for example, covers any "person," *id.* § 1692a(6), triggering the "presumption that 'person' does not include the sovereign," *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000). The Act goes even further by defining "State" broadly to include municipalities. 15

U.S.C. § 1692a(8). It also defines "debt" in a way that excludes tax debts. *See id.* § 1692a(5).

General Principles. That "officer" falls within a state exemption confirms its broad sweep. "Among the background principles of construction that [the Court's] cases have recognized are those grounded in the relationship between the Federal Government and the States under our Constitution." *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014). Given this "'dual system of government,'" the Court refuses to read federal laws as "impinging upon important state interests" unless Congress speaks clearly. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (citation omitted). By "resolv[ing] ambiguity" in favor of States, *Bond*, 134 S. Ct. at 2090, this rule respects their "sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere," *Gregory*, 501 U.S. at 461.

This clear-statement rule often leads courts to read "federal legislation threatening to trench on the States' arrangements for conducting their own governments" "in a way that preserves a State's chosen disposition of its own power." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004). This Court, for example, read a preemption law's savings clause—which preserved certain *state* safety laws—as covering *local* ordinances as well, thereby respecting "a State's decision on the division of authority between the State's central and local units." *Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 439 (2002). Likewise, it adopted a functional test to determine who may invoke § 1983's immunities, thereby respecting the diverse ways that States have

structured their affairs. *See Filarsky*, 132 S. Ct. at 1662-65.

Here, as noted, *supra* at 1-4, the Act touches a sensitive area, public debts, that raises sovereignty concerns. The clear-statement rule thus directs the Court to read "officer" broadly so as not to exclude persons a State has statutorily empowered to perform its collection duties because of the manner in which the State structures that relationship. After all, "[t]he States' sovereign authority gives them power to structure their legal departments as they please." Pet. App. 58a (Sutton, J., dissenting). And history teaches that the common way that governments structure themselves today was not the common way they structured themselves yesterday and may not be the common way they structure themselves tomorrow.

Two examples from *Filarsky*—one from the federal level, the other from the state—prove this point. At the federal level, even such a high-ranking person as "the Attorney General of the United States was expected to and did maintain an active private law practice" until 1853. *Filarsky*, 132 S. Ct. at 1663. In that regard, *Chisholm v. Georgia*, 2 U.S. 419 (1793)—which subjected States to suit in federal court—is relevant here not just because its short lifespan shows that federal litigation affecting "the People's money" raises sovereignty concerns. Pet. App. 58a (Sutton, J., dissenting). It is relevant because the lawyer for the *private plaintiff* was none other than Edmund Randolph, the first Attorney General. *Chisholm*, 2 U.S. at 419. (He was sure to disavow that "the United States themselves may be sued." *Id.* at 425.) That the chief legal officer

worked for the federal government "like an attorney on retainer," William Barr, *Attorney General's Remarks*, 15 Cardozo L. Rev. 31, 31 (1993), that his "private law office was the seat of his official duties," Leonard White, *The Federalists: A Study in Administrative History* 166 (1948), and that he had to buy his own "office supplies," Griffin Bell, *The Attorney General*, 46 Fordham L. Rev. 1049, 1051 (1978), all prove that "officer" extends beyond traditional employees.

At the state level, more than just public employees exercised law-enforcement powers. *Filarsky*, 132 S. Ct. at 1664. States permitted sheriffs to appoint "special" deputies for specific tasks, and courts treated them as protected by laws making it a crime to resist officers. William Murfree, Sr., *A Treatise on the Law of Sheriffs and Other Ministerial Officers* § 83, p.48 (1884); *Andrews v. State*, 78 Ala. 483, 485 (1885). "[A] person charged with the performance of one public duty," a court held, "is as much an officer, while engaged in its performance, as another who is charged with the performance of many public duties." *State v. Moore*, 39 Conn. 244, 250 (1872). Similarly, it was "a common practice in this country for private watchmen or guards to be vested with the powers of policemen, sheriffs or peace officers to protect the private property of their private employers." *NLRB v. Jones & Laughlin Steel Corps.*, 331 U.S. 416, 429 (1947). Although employed by private entities, they were "public officers when performing their public duties." *Id.* at 431. As one example, many who guarded the rails from the infamous train robbers of the late 1800s were public officers paid by private companies (in Ohio, their "shield" contained *both* the word "police" *and* the private railroad's name). 57 Ohio Laws 60, 60-61 (1867).

B. Special Counsel Are "Officers" Under The Act Because Ohio Law Empowers Their Position To Perform Sovereign Duties

Special counsel are state "officers" under the Act because their position is legally empowered to perform the Attorney General's debt-collection duties.

Authorized By Law. Special counsel's duties are "authorized by law." Ohio law requires the Attorney General's Office to represent Ohio, Ohio Rev. Code § 109.02, and to notify debtors of their state debts, *id.* § 131.02(B)(1). It adds, however, that "[t]he attorney general may appoint special counsel to represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect." *Id.* § 109.08. Accordingly, an "enactment" "empowers" special counsel's position.

If anything, this law provides more authorization than the statute in *Hartwell* that created constitutional officers. Here, like there, the legislature authorized a superior "to appoint" an inferior. *See Hartwell*, 73 U.S. at 393. But here, unlike there, Ohio law identifies the approved duties. The clerk's duties in *Hartwell* "were to be such as his superior in office should prescribe." *Id.*

Further, Ohio law directs special counsel to be paid, like many officers historically, "from funds collected by them in an amount approved by the attorney general." Ohio Rev. Code § 109.08. Following the Constitution's adoption, "[b]y far the larger number of federal officials were compensated by fees" from third parties. White, *supra*, at 298. As one ex-

ample, a 1791 law setting excise duties on liquor (the law that triggered the Whiskey Rebellion) authorized President Washington to pay collection officers "out of the product of the said duties, as he shall deem reasonable and proper" up to certain amounts. Act of Mar. 3, 1791, ch. 15, § 58, 1 Stat. 199, 213.

Finally, special counsel's tenure is "not fixed by" state law. Mechem, *supra*, § 445, p.284. That triggers the "general rule" that the position is held "at the will of either party." *Ex Parte Hennen*, 38 U.S. 230, 260-61 (1839); J.A. 185-86.

Duties Of The Office. Special counsel perform "the duties of the" Attorney General's Office. Ohio law directs the office to collect state debts "or secure a judgment and issue an execution for its collection." Ohio Rev. Code § 131.02(C). In two respects, these tasks are "public" charges vesting counsel "with some portion of the sovereign functions of the government." Mechem, *supra*, § 1, pp.1-2.

To begin with, it has long been considered a public duty to represent the sovereign. Dating to colonial times, it was the duty of attorneys general "to prosecute all actions, necessary for the protection and defence of the property and revenues of the crown." *Miner*, 2 Lans. at 398. "They were lawyers, but their powers were the powers of the state." Homer Cummings & Carl McFarland, *Federal Justice* 12 (1937). And while "[t]he prerogatives which pertain to the crown of England are here vested in the people," the "necessity for the existence of a public officer charged with the protection of public rights and the enforcement of public duties, by proper proceedings in the courts of justice, is just as imperative here as there." *Hunt v. Chicago, Horse, & Dummy R.*

Co., 13 N.E. 176, 181 (Ill. 1887). The year before Congress passed the Act, therefore, this Court held in the Appointments Clause context that only "Officers of the United States" may undertake "primary responsibility for conducting civil litigation for vindicating public rights." *Buckley*, 424 U.S. at 139.

In addition, the *types* of claims that special counsel litigate—those to protect the public fisc—confirm that they perform "sovereign" duties. As one court noted, "all persons who, by authority of law, are intrusted with the receipt of public moneys, through whose hands money due to the public, or belonging to it, passes on its way to the public treasury" must be considered officers. *Evans*, 74 Pa. at 139. Even under the Appointments Clause, Justice Story opined, positions associated with "the collection of revenue" were among "the most important civil officers." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1530, p.387 (1833).

Over the years, therefore, positions performing similar duties have been treated as "officers." District attorneys (now U.S. Attorneys) were once "private practitioners employed by the United States on a fee-for-services basis." *In re Sealed Case*, 838 F.2d 476, 527 (D.C. Cir. 1988) (Ginsburg, J., dissenting), *majority rev'd sub. nom. Morrison v. Olson*, 487 U.S. 654 (1988). As part of their duties, they litigated claims under the revenue laws, receiving, at one time, two percent of any recovery. *Revised Statutes of the United States, Passed at the First Session of the Forty-Third Congress*, 1873-74, § 825 (2d ed. 1878). Likewise, a "considerable portion" of a constable's job was collecting debts, and a "special constable" was "as fully protected as any other officer." Murfree, *su-*

pra, §§ 1120-21, p.609. Courts also identified receivers liquidating national banks as "officers" under federal laws. *Price v. Abbott*, 17 F. 506, 507-08 (C.C.D. Mass. 1883); *cf. Weiss v. Weinberger*, 2005 WL 1432190, *4 (N.D. Ind. June 9, 2005) (finding receiver to be officer under the Act). Shortly after Congress enacted the "officer" definition, a court even treated a lawyer appointed to recover state debts as an officer. *Evans*, 74 Pa. at 139-41.

* * *

At day's end, deciding which individuals are "officers" for purposes of particular statutory or constitutional provisions has perplexed courts for generations. "[T]he precise line of demarkation between an officer and governmental agent, employee or contractor, is difficult to draw." Montgomery Throop, *A Treatise on the Law Relating to Public Officers* § 1 p.2 (1892). For purposes of the Act, Plaintiffs concede that "'[t]he term "officer" is ambiguous' and 'open to multiple[] yet reasonable interpretations.'" Pet. App. 60a (Sutton, J., dissenting) (citation omitted). If this Court harbors the same doubt, it compels a ruling for special counsel. "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory*, 501 U.S. at 460. The Act, like § 1983, can be reasonably read not to require States to add collection lawyers to their payrolls to receive the benefits of a state exemption.

C. The Sixth Circuit's Contrary View Was Mistaken

The Sixth Circuit mistakenly held that special counsel fall outside the broad "officer" definition.

1. The Sixth Circuit read the Dictionary Act's definition too narrowly

Overlooking the expansive initial language in the Dictionary Act's definition, the Sixth Circuit strictly read its two elements.

Authorized By Law. It held that special counsel were not "authorized by law" to collect state debts because Ohio law "simply establishe[d] the framework under which the Attorney General may delegate the collection of debts to a third-party debt collector." Pet. App. 32a. An "[a]uthorization to actually act as an officer," the court continued, "entails the actual capability to act, not merely the prospect of a future delegation." *Id.*

Yet the definition does not read "authorized *exclusively* by law" or "authorized *comprehensively* by law"; it reads "authorized by law." A law need only empower the position, nothing more. Thus, many cases found that laws created "officers" by authorizing a superior "to appoint" an inferior. This Court, for example, considered a clerk to be an officer when the statute allowed a superior "to appoint" the clerk. *Hartwell*, 73 U.S. at 393. Another found a "special police officer" to be an officer when a law permitted the sheriff "to appoint" him. *Territory v. Wills*, 25 Haw. 747, 756, 759-60 (1921). And still another found a "health inspector" to be an officer when a law directed a board to appoint him. *Patton v. Bd. of Health*, 59 P 702, 703, 706 (Cal. 1899).

Indeed, the Sixth Circuit's reading would exclude constitutional officers. The Appointments Clause bars Congress from directly empowering certain "officers" to perform their functions; it vests that ap-

pointment power in others. U.S. Const. art. II, § 2, cl. 2. It will always be the case for these officers that a law will create only "the prospect of a future delegation" (a synonym for appointment). Pet. App. 32a. A reading of the statutory term "officer" that excludes constitutional officers is not a good reading.

Further, special counsel were not, as the Sixth Circuit said, "authorized *only* by contract." Pet. App. 33a (emphasis added). The Revised Code references the position dozens of times. It treats special counsel interchangeably with assistant attorneys general, *id.* §§ 109.361, 2743.14, identifying both as "offices [or] positions of trust or employment with the government," *id.* §§ 124.01(K), 124.11(A)(11). It appears that the Attorney General did not even always direct special counsel via formal contracts. A 1975 agency opinion suggested that, at that time, the only "limits which [were] imposed on special counsel" were "those imposed upon any individual or entity responsible for the collection of claims owed to the State." J.A. 382.

The Sixth Circuit lastly invoked the "absurdity" canon, noting that a normal reading of "authorized by law" would "bestow[] officer status" "on every independent contractor working on behalf of a state." Pet. App. 33a-34a. Not so. That a position be authorized by law is *one* requirement, not the *only* one. A person must also perform "the duties of the office," i.e., sovereign duties. Most contracts between an officer and some private party will not appoint the party to perform sovereign tasks. Take the Sixth Circuit's hypothetical building contractor. Pet. App. 34a & n.7 An early opinion defining "officer" rejected this very hypothetical on this very ground. A "contractor to build a state house" is not an officer be-

cause construction work does not encompass "a portion of the sovereign power." *Justices*, 3 Me. at 483. Building public buildings has never been a sovereign function; collecting public money always has.

Duties Of The Office. The Sixth Circuit next read "the duties of the office" to require the person to perform "*all duties* associated with the office." Pet. App. 35a. Special counsel, the court added, do not perform all of the Attorney General's duties. *Id.*

Yet "the" does not mean "all." The Dictionary Act uses the definite article to identify the *specific* duties delegated by the *specific* authorizing law. Here, that law permits special counsel to perform the debt-collection duties of the Attorney General's Office. Read otherwise, the Dictionary Act would exclude any *inferior* officer in an office who could not perform all of the *superior*'s duties.

Additionally, special counsel's position should be deemed an "office" within the meaning of *the Act*, which should be read functionally, not formalistically. To be sure, the Sixth Circuit correctly said that *state law* did not identify an "office of special counsel." Pet. App. 35a & n.9. But, under the Act, office status should turn on duties, not labels. *See Clyatt*, 22 So. at 722. The law in *Hartwell*, for example, did not create the "office of the clerk." 73 U.S. at 392-93. The law in *Moore* did not create the "office of special deputy." 39 Conn. at 249-50. And the law in *Evans* did not create the "office of special agent." 74 Pa. at 139-40. When statutorily created positions perform sovereign duties, they may be considered offices under the Act no matter what "name or title they may be designated in the law." *Id.* at 139.

Finally, the Sixth Circuit asserted that collecting *consumer* debt did not involve "sovereign power." Pet. App. 35a-36a. But special counsel *do* collect tax debts, and it would be strange for their "officer" status to fluctuate day-to-day depending on the debt they collected. Regardless, a State's privileges regarding debts have not generally been limited in that way. A sovereign's priority right, for example, did not "attach[] only to taxes"; it "cover[ed] all manner of debts due to the state." *City and Cnty. of Denver v. Stenger*, 295 F. 809, 815-16 (8th Cir. 1924) (citation omitted). And a sovereign's immunity did not depend on the nature of the lawsuit. A State's university could invoke immunity just as much as its tax department, even if the university's conduct "resemble[d] the behavior of 'market participants.'" *See generally Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 684 (1999).

2. The Sixth Circuit wrongly rejected the clear-statement rule

The Sixth Circuit rejected the clear-statement rule because "Ohio is not being regulated; nor is the structure of its government being challenged." Pet. App. 39a. This was factually and legally incorrect. Factually, the Sixth Circuit's reading of the Act *does* affect state structure. A State's choice between special counsel and assistant attorneys general is just as much a structural choice as is its choice between state and local employees. *Ours Garage*, 536 U.S. at 437-39. Indeed, Ohio's Attorneys General have had the generic authority to appoint special counsel *longer* than they have had the generic authority to employ lawyers. *Compare* 97 Ohio Laws at 60, *with* 114 Ohio Laws at 53.

Legally, the Sixth Circuit misread the clear-statement rule. That rule has never been limited to laws "challeng[ing]" state "structure." Many cases apply the rule to laws not regulating the States *at all*. *Bond* invoked it to interpret a federal criminal law not to cover "an amateur attempt by a jilted wife to injure her husband's lover." 134 S. Ct. at 2083. Further, this case involves state debts, the *very* context in which courts may have initially articulated the rule. *Cf. Shelton*, 47 Conn. at 404-05. If it applies anywhere, it applies here.

3. The Sixth Circuit placed too much weight on special counsel's employment status

The Sixth Circuit held that special counsel cannot be officers "because they *are* independent contractors" rather than employees. Pet. App. 38a. This reading was textually and historically unsound.

Textually, the exemption covers "officer[s] or employee[s]." 15 U.S.C. § 1692a(6)(C). It makes little sense to require, as a strict element of "officer" status, that the person be an "employee" when those words sit next to each other. If Congress meant for all officers to be employees, the Act would simply cover "any employee." The Sixth Circuit thus violated its "duty to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted).

Historically, many officers were not traditional "employees." *Filarsky*, 132 S. Ct. at 1662. That is why the Court adopted a functional test for § 1983's immunities, one that "flows not from rank or title or 'location within the Government,' but from the na-

ture of the responsibilities of the individual official." *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985) (citation omitted). And it is why the Court should adopt a similar test to determine whether a law created an "officer." Just as "immunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis," *Filarsky*, 132 S. Ct. at 1665, so too "officer" status under the Act should not vary depending on whether an appointed sheriff, constable, or other officer is an independent contractor. *Cf. Young v. City of Bridgeport*, 42 A.3d 514, 520-21 (Conn. App. Ct. 2012); *Swinehart v. McAndrews*, 69 F. App'x 60, 62 (3d Cir. 2003).

4. The Sixth Circuit mistakenly relied on Ohio law and other sections of the Act

The Sixth Circuit's arguments tied to state law and other sections of the Act were likewise mistaken.

Ohio Law. The Sixth Circuit asserted that special counsel "fail to qualify as officers" under Ohio law. Pet. App. 39a-42a. Its analysis was irrelevant and overbroad. It was irrelevant because this case involves the meaning of "officer" in a federal statute. If the Sixth Circuit believed that the Act adopted each State's labels, that reading runs counter to the presumption that "Congress when it enacts a statute is not making the application of the federal act dependent on state law.'" *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989) (citation omitted). Courts should examine state law only to determine whether an actor satisfies the Act's *uniformly* broad federal elements—e.g., that a state law empowers a position to perform sovereign duties.

This is nothing new. In the employment context, the Court "relie[s] on the general common law of agency, rather than on the law of any particular State, to give meaning to" terms like "employer" or "employee." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989). So, for example, if a State treated *all* lawyers as "officers" of its courts, that would not make all lawyers "officers" under the Act. Similarly, in the § 1983 context, the Court establishes immunities tied to "general principles of tort immunities and defenses"; it does not adopt a state-by-state approach tied to each State's tort immunities. *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976). Steve Filarsky was entitled to qualified immunity under § 1983 whether or not California immunized him from a tort suit. *See Filarsky*, 132 S. Ct. at 1665. So, too, an individual might be an officer under the Act even if not an officer under some state immunity law.

Regardless, the Sixth Circuit painted with too wide a brush. To conclude that special counsel are categorically not officers, it invoked the definition in one Ohio law (the one directing the Attorney General to represent officers or employees), and an agency opinion interpreting another. Pet. App. 39a-42a & n.15; *but see Bell v. Newnham*, 1990 WL 131972, *2 (Ohio Ct. App. Sept. 14, 1990) (finding a special counsel to be an officer or employee triggering court-of-claims jurisdiction). Even if special counsel are not "officers" under *these provisions*, it does not mean that they are not officers under the entire *Revised Code*. To take one example, Ohio's public-records laws govern "records kept by any public office," Ohio Rev. Code § 149.43(A)(1), including some private entities "perform[ing] a governmental function," *State ex rel. Schiffbauer v. Banaszak*, 33 N.E.3d 52, 54-55

(Ohio 2015). Special counsel are "officers" under those laws, as their retention agreements show. J.A. 176. The same sovereign functions that *subject* special counsel to state public-records laws *exempt* them from federal debt-collection laws.

The Act. The Sixth Circuit suggested that two sections of the Act support its view that special counsel are not "officers." Pet. App. 42a-43a. One permits the Consumer Financial Protection Bureau to exempt debt-collection practices if it finds that a State has "substantially similar" laws regulating the practices. 15 U.S.C. § 1692o. This section merely allows a State to exempt private debt collectors who collect private debts from the Act if the State regulates those collectors in the same way. It says nothing about the government exemption.

The other section exempts parties who, under contracts with state prosecutors, assist in operating "a pretrial diversion program for alleged bad check offenders." *Id.* § 1692p(a)(1). Contrary to the Sixth Circuit's view, Pet. App. 43a, a holding that special counsel are "officers" would not cover operators of bad-check programs and thereby make § 1692p superfluous. It would be a stretch to characterize those operators as officers; teaching finance classes "designed to discourage the writing of bad checks" is not a sovereign duty. S. Rep. No. 109-256, at 12 (2006), *as reprinted in* 2006 U.S.C.C.A.N. 1219, 1231.

II. Special Counsel's Use Of State Letterhead Was Not "Misleading"

Whether or not special counsel are state officers, their use of state letterhead did not violate 15 U.S.C. § 1692e. Section 1692e prohibits practices that could

materially mislead consumers. Here, special counsel's use of Attorney General letterhead could not mislead consumers into believing anything that was materially false.

A. Section 1692e Prohibits Practices That Could Materially Mislead Consumers

Before listing sixteen prohibitions, § 1692e states that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." *Id.* The terms "false," "deceptive," and "misleading" had similar meanings in 1977 Black's Law Dictionary defined "false representation" as "[a] representation which is untrue, willfully made to deceive another to his injury." *Black's Law Dictionary* 724 (4th ed. 1968) [hereinafter *Black's* 4th ed.]; *see* 5 *Oxford English Dictionary* 697 (2d ed. 1989) (defining "false" as "[c]ontrary to what is true"). It defined "deception" as "intentional misleading by falsehood spoken or acted." *Black's* 4th ed., *supra*, at 494; *see* 4 *Oxford English Dictionary* 324 (defining "deceive" as "to cause to believe what is false"). And it defined "misleading" as "calculated to lead astray or to lead into error." *Black's* 4th ed., *supra*, at 1151; *see* 9 *Oxford English Dictionary* 873 (defining "mislead" as "[t]o lead astray in action or conduct").

These definitions show that § 1692e, at bottom, contains two elements. A communication must be capable of making consumers believe something that is "untrue." And the communication must be capable of leading consumers astray in their debt-related "action[s]." This view—that § 1692e prohibits *materially misleading* communications—is confirmed by the conduct that its specific subsections prohibit.

1. A communication proscribed by § 1692e must be reasonably capable of conveying an erroneous message

a. Whether a communication is "false, deceptive, or misleading" turns on what it communicates. While some statements might *unambiguously* convey a true or false idea, others will be *ambiguous* and susceptible to different readings—some true, some false. *Cf.* Restatement (Second) of Torts § 527 (1977). Whether a statement could be read misleadingly to convey a falsehood generally depends on how ordinary persons in the intended audience could understand it. By invoking this "average" person in the audience, courts set "a benchmark divorced from any one person, but reflecting the behavior of classes of persons acting reasonably." *Gammon v. GC Servs. Ltd. P'ship*, 27 F.3d 1254, 1259 (7th Cir. 1994) (Easterbrook, J., concurring).

This type of objective test pervades the law. The common law long assessed liability from "what would be blameworthy in the average man, the man of ordinary intelligence and prudence." Oliver Wendell Holmes, Jr., *The Common Law* 108 (1923). Securities cases ask "whether a statement is 'misleading'" from "the perspective of a reasonable investor." *Omnicare, Inc. v. Laborers Dist. Council Ind. Pension Fund*, 135 S. Ct. 1318, 1327 (2015). Trademark cases "demand[] a showing that the allegedly infringing conduct carries with it a likelihood of confounding an appreciable number of reasonably prudent purchasers exercising ordinary care." *Int'l Ass'n of Machinists v. Winship Green Nursing Ctr.*, 103 F.3d 196, 201 (1st Cir. 1996) (citing *McLean v. Fleming*, 96 U.S. 245, 251 (1877)). False-advertising cases ask wheth-

er an ad could "'mislead consumers acting reasonably under the circumstances.'" *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1168 (9th Cir. 2012); 1A Louis Altman & Malla Pollack, Callmann on Unfair Competition, Trademarks & Monopolies § 5:27 (4th ed.), *available at* Westlaw Callmann.

The same test—one asking whether an *average consumer* in the *relevant audience* could reasonably read a letter to convey a falsehood—best balances the Act's goals. On the one hand, the Act seeks to protect "*consumers*" from "abusive debt collection practices." 15 U.S.C. § 1692(e) (emphasis added). The test accounts for that audience. The average consumer who has defaulted on a debt is different from, say, the average investor reviewing a prospectus, *Omnicare*, 135 S. Ct. at 1327, or the average physician reviewing a drug label, *Gammon*, 27 F.3d at 1259 (Easterbrook, J., concurring). As the Court said under the Federal Trade Commission Act ("FTC Act"), "that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced." *FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 116 (1937).

On the other hand, the Act seeks "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged" by those who do. 15 U.S.C. § 1692(e). The test accounts for conscientious collectors by requiring more than a showing that a small fraction of consumers could misread a debt-collection letter. Rather, a significant fraction must be able to reasonably misread the letter. "The standpoint is not that of the *least* intelligent consumer in this nation of 300 mil-

lion people, but that of the average consumer in the lowest quartile (or some other substantial bottom fraction) of consumer competence." *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 774 (7th Cir. 2007) (Posner, J.) (citations omitted).

b. To be sure, most courts have adopted a "least-sophisticated consumer standard." *Jensen v. Pressler & Pressler*, 791 F.3d 413, 419 & n.3 (3d Cir. 2015). But the Court should reject that test.

For one thing, the test itself misleads. "[T]aking 'least sophisticated consumer' seriously," Judge Easterbrook noted, "either condemns all debt collection efforts (because some simpleton is bound to read the most fantastic things into ordinary language) or creates a system random in operation (because courts must be applying some other rule, which they have not communicated to debt collectors)." *Gammon*, 27 F.3d at 1259 (Easterbrook, J., concurring). His latter prediction has proved true. While these courts link liability to the least-sophisticated consumer, they reject liability "'for bizarre or idiosyncratic interpretations,'" *Wilson v. Quadramed Corp.*, 225 F.3d 350, 354-55 (3d Cir. 2000) (citation omitted), and "'preserve[] the concept of reasonableness,'" *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360, 363 (2d Cir. 2005).

For another, the least-sophisticated-consumer test lacks any historical pedigree. An initial court to adopt this test suggested that it came from the FTC Act, noting that a Second Circuit opinion once stated that the FTC "'should look not to the most sophisticated readers but rather to the least.'" *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1175 (11th Cir. 1985) (quoting *Exposition Press, Inc. v. FTC*, 295 F.2d 869,

872 (2d Cir. 1961)). But that opinion described the FTC's test as asking whether an advertisement could "'deceive a substantial portion of the purchasing public.'" *Exposition Press*, 295 F.2d at 872 (citation omitted). "A representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed." *In re Kirchner*, 63 F.T.C. 1282, 1963 WL 66830, *6 (1963). Indeed, after the FTC issued clarifications in 1983, it has assessed these claims from the perspective of "consumers acting reasonably." *Davis*, 691 F.3d at 1168; *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 490 (D.C. Cir. 2015); *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 1984 WL 565319, *37 & app. at *46-47 (1984).

2. A communication proscribed by § 1692e must concern matters that could affect a debtor's decisionmaking

A representation must also be capable of "lead[ing]" consumers "astray in [their] action or conduct." 9 *Oxford English Dictionary* 873. In other words, it must be material. *See Neder v. United States*, 527 U.S. 1, 16 (1999). "Materiality is an ordinary element of any federal claim based on a false or misleading statement." *Hahn v. Triumph P'ships LLC*, 557 F.3d 755, 757 (7th Cir. 2009). The FTC Act, for example, has long included it. *Cliffdale*, 1984 WL 565319, *37. And circuit courts have uniformly adopted this element under the Act. *Jensen*, 791 F.3d at 417-18 (citing cases).

A materiality element furthers the Act's purposes. 15 U.S.C. § 1692(e). Without it, § 1692e could harm conscientious debt collectors. The Act permits plain-

tiffs to recover statutory damages and attorney's fees without proving any injury. 15 U.S.C. § 1692k(a)(2)-(3). It also permits plaintiffs to recover for honest misinterpretations of the Act. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 577 (2010). Courts have recognized that the lack of any need to show a plaintiff's injury combined with the lack of any need to show a defendant's intent has "'enabled'" a sophisticated "'class of professional plaintiffs.'" *Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 513-14 (6th Cir. 2007) (citation omitted). It would greatly magnify these existing concerns to interpret § 1692e's liability standards as reaching any technical falsehood, no matter how irrelevant to the collection of any debt.

3. Section 1692e's specific prohibitions reinforce these general elements

Section 1692e's specific prohibitions reinforce that it covers material misrepresentations. Its subsections generally prohibit materially misleading practices, such as falsely indicating that a letter comes from an attorney or that a debt collector is affiliated with the government. 15 U.S.C. § 1692e(1), (3). The two subsections on which Plaintiffs relied below—§ 1692e(9) and (14)—provide further examples of the *materially misleading* communications that fall within the section. Pet. App. 47a. They prohibit:

> (9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

> (14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

15 U.S.C. § 1692e.

The Simulation Prohibition. Section 1692e(9) bans debt collectors from deceptively indicating that the government has authorized, issued, or approved a letter. Debt collectors can do so in two ways. The subsection initially prohibits a letter from expressly "represent[ing]" that it has been authorized, issued, or approved by the government when that claim is "untrue." *Black's* 4th ed., *supra*, at 724 (defining "false representation"). Even when the letter does not expressly say that the government has approved the communication, the subsection prevents debt collectors from pretending—through formatting or the like—that the government has done so. *Id.* at 1555 (defining "simulate" as "[t]o assume the mere appearance of, without the reality; to assume the signs or indications of, falsely; to counterfeit; feign; imitate; pretend.").

The "True Name" Provision. Section 1692e(14) prevents a collector from using an organization name "other than the true name" of the collector's organization. This subsection prohibits debt collectors from "employ[ing]" fictitious names. *Black's* 4th ed., *supra*, at 1710. It, in other words, "forbids the use of a pseudonym," *White v. Goodman*, 200 F.3d 1016, 1018 (7th Cir. 2000), one that might make it difficult for a consumer to discover a debt collector's identity. It does not, by contrast, prohibit debt collectors from using more than one name in letters. The Act, for example, sometimes requires debt collectors to "use"

the creditor's name, mandating that a validation notice include "the name of the creditor to whom the debt is owed." 15 U.S.C. § 1692g(a)(2).

B. Attorney General Letterhead Accurately Conveys That Special Counsel Sent Letters For The Attorney General's Office

Special counsel's use of Attorney General letterhead would not lead consumers into believing a falsehood. Instead, that letterhead accurately conveys that they act on behalf of the Attorney General's Office when they send the letters. Accordingly, the letterhead neither falsely represents that special counsel's letters are authorized by the office (under § 1692e(9)) nor uses a false name when invoking the office (under § 1692e(14)).

1. When assessed from *any* consumer's perspective, the letterhead conveys that the letters have been sent on behalf of the organization identified (the Attorney General's Office) by the individuals listed in the signature block (special counsel). Pet. App. 14a, 17a. Because those facts speak the truth, no consumer would be "[led] into error" by the letterhead. 9 *Oxford English Dictionary* 873.

Starting at the top, the letterhead identifies the *entity* for whom the letter has been sent. The debt being collected is one owed to a state creditor, for whom state law requires the Attorney General to collect (and send notice). Ohio Rev. Code § 131.02. To that end, the Attorney General appoints special counsel "to represent the state," *id.* § 109.08, by "provid[ing] legal services on behalf of the Attorney General," J.A. 173. Because they act for, and under the general control of, the Attorney General's Office,

the office requires special counsel, "[i]n all pleadings, notices and/or correspondence," to "indicate that such document is prepared by the Special Counsel in its position as Special Counsel for the Attorney General." *Id.* In short, the letterhead conveys *on whose authority* special counsel sends the letters.

Turning to the bottom, the signature blocks identify the *persons* who send the letters for the Attorney General's Office. They note that a "Special Counsel" or an "Outside Counsel" to the Attorney General sent the letters, and identify the law-firm names and addresses at which counsel may be contacted, and to whom the debts should be paid. Pet. App. 14a, 17a; *cf.* J.A. 93, 98. In short, the signature blocks convey *who* has sent the letters for the Attorney General's Office, and *who* assists the office in collecting debts.

In sum, "[t]he Act does not transform the special counsels' use of the Ohio Attorney General's stationary into 'false,' 'deceptive,' or 'misleading' actions under the statute any more than it would do the same if a special counsel listed his or her name and firm under the Ohio Attorney General's name and address in a brief filed in this Court." Pet. App. 63a (Sutton, J., dissenting). That is not a speculative comparison. Because the Act regulates lawyers, courts have considered allegations that judicial pleadings were misleading. *See Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 590 (6th Cir. 2009); *Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F.3d 470, 472 (7th Cir. 2007). If the use of the Attorney General's name on a complaint does not violate the Act, the use of that name in a letter does not either.

2. Because these letters *accurately* conveyed that they were sent for the Attorney General's Office, spe-

cial counsel's use of the office letterhead does not violate § 1692e(9) or § 1692e(14).

Beginning with § 1692e(9), the letterhead does not make these letters "simulate[]," or "falsely represent[] to be" documents that are "authorized, issued, or approved" by the Attorney General's Office. This letterhead is authorized, approved, and, indeed, *required* by that office. J.A. 93, 112. Because the letters are in "reality" authorized by the office, it cannot be said that they "pretend[]" to be. *Black's* 4th ed., *supra*, at 1555. One need not formally invoke the "expressio unius" canon to interpret a prohibition on false communications as permitting truthful ones.

As for § 1692e(14), the Attorney General's Office is a "true name" of special counsel's organization when they act on its behalf. Special counsel *do* act for the Attorney General's Office and so the office's name is not a pseudonym. *See White*, 200 F.3d at 1018. Indeed, Plaintiffs have conceded that special counsel may say "special counsel to the Attorney General's Office" in the signature blocks. J.A. 396-97. Referencing the office in the letterhead cannot be considered a "false" name either. If the name is true at the bottom of the page, it is true at the top.

Plaintiffs' affidavits confirm that this letterhead does not violate § 1692e. Apart from alleging confusion over the combination of state letterhead and law-firm names, Plaintiffs' only *falsity* allegations are that the letterhead led them to believe that the Attorney General "might charge me with a crime," J.A. 139, or interfere with "my bankruptcy case," J.A. 137 "But neither of the milquetoast letters in the record threatens criminal prosecution, civil penalties, or any action whatsoever." Pet. App. 69a (Sutton, J.,

dissenting). Even the majority below did not credited *those* misleading theories. Pet. App. 45a-54a. Instead, the allegations are the precise types of "unreasonabl[e] misunderst[andings]" that cannot establish liability. *Cf. Kirchner*, 1963 WL 66830, *6.

C. The Sixth Circuit's Competing Rationales Lack Merit

The Sixth Circuit offered several mistaken reasons for finding a factual dispute over whether special counsel's use of state letterhead violated § 1692e.

1. *The letters came from Mike DeWine?* The Sixth Circuit suggested that the letterhead made the letters "technical[ly]" false because "Mike DeWine is not the true name of any Defendant." Pet. App. 48a. If correct, every letter that an individual other than the Attorney General has sent on Attorney General letterhead has been "technically" false because it communicated that it came personally from the Attorney General when it came from the person signing it. *Cf.* Rule 28(j) Letter of Nov 13, 2009, *Girts v. Yanai*, 600 F.3d 576 (6th Cir. 2010) (No. 08-4592, Doc.36-1) (assistant attorney general using Attorney General Richard Cordray's letterhead); Rule 28(j) Letter of Sept. 15, 2008, *Wrinn v. Johnson*, 315 F App'x 560 (6th Cir. 2009) (No. 07-4354, Doc.40) (same for Attorney General Nancy Rogers). No person believes that. Consumers are "bound to read collection notices in their entirety." *Campuzano-Burgos v. Midland Credit Mgmt., Inc.*, 550 F.3d 294, 299 (3d Cir. 2008). The signature lines—as they were *not* signed by the Attorney General—dispelled any impression that he *personally* penned them.

2. *The letters came from the office?* The Sixth Circuit suggested that the letterhead falsely "implied that the letter[s] [were] issued by" the Attorney General's Office. Pet. App. 48a; *id.* at 49a (noting that the letterhead suggests "it is the State of Ohio that is threatening to take action"). That was an accurate implication, not a misleading one. Nobody thinks that the Attorney General's Office *itself*—that is, the inanimate entity—literally can "issue" anything. Like any entity, it acts through its representatives. Special counsel act as the office's representatives when they send these letters, just as assistant attorneys general do if they send letters. The Sixth Circuit responded that special counsel "are not" the office because they are independent contractors. Pet. App. 52a-53a. This fact alone has neither legal nor practical significance.

Legally, "'[n]othing about the title independent contractor invariably precludes someone from being an agent'"—one entitled to invoke a principal's name. Pet. App. 67a (Sutton, J., dissenting) (citation omitted); Restatement (Second) of Agency § 2(3) (1958). Indeed, if special counsel were *not* agents of the office for some purposes, their litigation against (or settlements with) state debtors could *not* bind the office. Precisely because those activities do so, special counsel must generally obtain approval before filing suit or settling claims. J.A. 149.

In any other context, this is obvious. "Many insurance agents are independent contractors" affiliated with national companies like Nationwide Mutual Insurance. Pet. App. 65a-66a (Sutton, J., dissenting). It is not "misleading" for those individuals to use Nationwide's letterhead when "selling Nation-

wide insurance." Pet. App. 66a. Many local franchisees enter independent-contractor relationships with national fast-food companies. *See Patterson v. Domino's Pizza, LLC*, 333 P.3d 723, 725 (Cal. 2014). That does not permit a mom-and-pop competitor of a Burger King franchisee to bring a "false designation of origin" claim on the ground that the franchisee's use of the national name misleads consumers into believing that the national company made its hamburgers. *Cf. Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 29-37 (2003) (describing false-designation-of-origin claims). In the criminal context, courts have long interpreted a law barring an entity's "agents" from embezzling federal funds as reaching some independent contractors. *United States v. Hudson*, 491 F.3d 590, 595 (6th Cir. 2007). If this reading were "misleading," it would have long ago triggered the criminal law's safety net for the unsophisticated: the rule of lenity.

Practically, the Sixth Circuit failed to explain why it would matter to consumers that the person sending these letters was an independent contractor. That distinction, of course, matters as between the contracting parties. Assistant attorneys general receive retirement benefits; special counsel do not. J.A. 94, 173, 193-94. The office pays payroll taxes for assistant attorneys general; it does not for special counsel. *Id.* But the distinction is irrelevant to the powers and duties that assistant attorneys general and special counsel have vis-à-vis debtors. The attorneys are materially indistinguishable from that perspective. Both generally report to the Collections Enforcement Section (and ultimately to the Attorney General); both have the same state-law tools for collecting debts; both may sign pleadings under the At-

torney General's name. J.A. 99-102, 173. In short, the Sixth Circuit failed to explain why a consumer would care that the office provides special counsel with Form 1099s, but gives assistant attorneys general W-2s.

3. *The letterhead confuses?* The Sixth Circuit suggested that the letterhead "has led to confusion" because the office has received calls from debtors "asking whether the letters were authentic." Pet. App. 48-49a. The court ignored what the office says in response to those calls: Yes. J.A. 101. The letterhead is no more "misleading" than that response. Indeed, this point "contradicts plaintiffs' entire theory of liability." Pet. App. 69a (Sutton, J., dissenting). It suggests that special counsel should use bolded disclaimers about how the Attorney General's Office *really* stands behind their collection efforts.

This also turned a virtue into a vice. Unlike Plaintiffs—both of whom quickly contacted their attorneys on receipt of their letters, J.A. 137, 139-40—most debtors *lack* attorneys on demand to ask questions. For the unsophisticated, the letterhead signals counsel's connection to the office and identifies a different outlet for concerns. This might have been one purpose behind the tax law that required special counsel to use the letterhead for tax debts: Ohio law requires the Attorney General to appoint "problem resolution officers" to review tax complaints about "special counsel." Ohio Rev. Code §§ 109.08, .082.

The Attorney General, it bears noting, wears many hats. The office also oversees Ohio's Consumer Sales Practices Act. *Id.* §§ 1345.05-.06. It strives to balance consumer protection and fair collection. Whether or not special counsel are *statutorily* obli-

gated to follow the Act, they remain *contractually* obligated to follow its standards. J.A. 194. The Attorney General's Office "has zero tolerance" for communications with debtors that show "anything less than complete respect for [their] rights." J.A. 193. Yet if debtors remain in the dark about special counsel's connection to the office (because this suit requires them to hide it), they might not know to report real abuse.

4. *The letterhead intimidates?* The Sixth Circuit said that "[i]ntimidation is at the heart of this case," Pet. App. 45a, because the letterhead "may inappropriately influence a consumer's decisions," Pet. App. 53a, even though state creditors lack any "special authority that a regular creditor does not" have, Pet. App. 45a. This argument was wrong for two reasons.

Reason One: It misreads state law If debts have been certified to the Attorney General, a debtor's tax refund "may be applied in satisfaction"—whether or not the debts have gone to judgment. Ohio Rev. Code § 5747.12. That is untrue of private debts. And, unlike with a private creditor, statutes of limitation do not run against state creditors unless they expressly say so. *Ohio Dep't of Transp. v. Sullivan*, 527 N.E.2d 798, 800-01 (Ohio 1988); *cf.* Ohio Rev Code § 2329.07(A). The State also uses lottery prizes exceeding $5,000 to pay state debts. *Id.* § 3770.073(A).

Given these differences, debtors would care that special counsel collect state debts. If anything, special counsel's use of *private* letterhead might lead debtors to "assume that the letter does *not* concern a state debt." Pet. App. 9a (Sutton, J., dissenting from denial of rehearing en banc). It may not be obvious, for example, that Hocking College is a public entity

Thus, the only thing that might be "misleading in this setting would be to suggest (through a law firm letterhead alone) that this *was not a state debt*." Pet. App. 68a (Sutton, J., dissenting).

Reason Two: This intimidation argument severs § 1692e from its falsity roots. The Sixth Circuit held that it would *not* "preclude[] liability under the" Act even if the letters were an "accurate description by special counsel of their relation to the" office. Pet. App. 53a. Likewise, it all but conceded that, but for the government exemption, its view could hold state employees liable. Pet. App. 53a-54a. Both concessions follow from the court's holding that the "leverage" achieved by the letterhead violates § 1692e. Pet. App. 54a.

Yet § 1692e targets deception, not intimidation. It sometimes compels "intimidating" statements, as is shown by its subsections on "legal process." One prohibits a debt collector from falsely representing "that documents are legal process," 15 U.S.C. § 1692e(13), because that falsehood would intimidate debtors into believing that the debt collector has gotten the courts involved. If, however, the debt collector *has* gotten the courts involved, another subsection prohibits the debt collector from falsely representing "that documents are not legal process," because that falsehood will lead debtors into a mistaken sense of security (even if the debt collector was trying to be less "intimidating"). *Id.* § 1692e(15).

The Sixth Circuit's broad view of the Act's substantive provisions also doubled down on the harms to state sovereignty arising from its narrow view of the Act's "officer" exemption. The decision below told States not only that they are *subject* to the Act if they

structure their debt collection in certain ways, but also that their decision to delegate debt collection to their chief legal officer could *violate* the Act if they do not hide that structure from debtors. The Sixth Circuit's merits holding thus ran afoul of the clear-statement rule just as much as its exemption holding. States have the right to collect their debts through "the structure" that they see fit. *Gregory*, 501 U.S. at 460. Here, the Court should not read § 1692e in a way that "trench[es] on" Ohio's century-old decision to collect debts through its Attorney General. *Nixon*, 541 U.S. at 140.

5. *Sarah Sheriff was not special counsel?* The Sixth Circuit briefly noted that "Sarah Sheriff," who signed the letter sent to Plaintiff Meadows, was "not a special counsel." Pet. App. 48a. The court rightly placed no further significance on this letter-specific point because it does not match Plaintiffs' counts, which asserted class-wide allegations focused on the *general* use of the letterhead. *See* J.A. 52-57.

If the Court dives into the letter-specific facts, it will find the mistake immaterial (like the district court). Pet. App. 96a-97a. Fact One: In 2008, special counsel and Meadows signed a judgment entry in which she, with her counsel, agreed to pay this debt. J.A. 388-90. Fact Two: Meadows paid for years. J.A. 385. Fact Three: Sheriff recalls fielding a call from Meadows asking her how much she owed; Sheriff sent the letter in response. J.A. 385. Fact Four: The letter says that, "[p]er your request, this is a letter with the current balance," and that Meadows may contact Sheriff with "further questions." Pet. App. 17a. Against all this, Meadows says: "I don't recall ever asking anyone for any information about this

matter." J.A. 139. That does not create a jury question. *Cf. Hemphill v. State Farm Mut. Auto. Ins. Co.*, 805 F.3d 535, 541 (5th Cir. 2015) ("Lack of memory by itself is insufficient to create a genuine dispute of fact."). No person would find the signer's status relevant for a letter conveying a balance. *See Jensen*, 791 F.3d at 422 (listing wrong name on subpoena "could not possibly have affected" debtor's "'ability to make intelligent decisions'" (citation omitted)).

* * *

"Some lawsuits make sense only to lawyers." *Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 400 (6th Cir. 2015) (Kethledge, J., dissenting). Courts, for example, have rejected claims that a debt collector misleadingly called a credit-card debt a "loan" when consumers really know that debt as "a merchant's account receivable," *Miller*, 561 F.3d at 592, or that a debt collector's state-mandated disclaimer about the rights of Coloradoans misleadingly implied to non-Coloradoans that they lacked similar rights, *White*, 200 F.3d at 1020. This Court too should reject the claim that special counsel for the Attorney General's Office cannot invoke the office's name pursuant to its command. The Court has elsewhere recognized the risks of "permit[ing] a plaintiff 'with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'" *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (citation omitted). Those risks reach their apex under the Act, whose procedural provisions already "create incentives to file lawsuits even where no actual harm has occurred." *Jerman*, 559 U.S. at 616 (Kennedy, J., dissenting).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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JANUARY 2016

APPENDIX

APPENDIX

1. 15 U.S.C. § 1692a.

Definitions.

As used in this subchapter –

(1) The term "Bureau" means the Bureau of Consumer Financial Protection.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of col-

lecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is inci-

dental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

2. 15 U.S.C. § 1692e.

False or misleading representations.

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of—

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

3. Ohio Rev. Code § 109.08.

Special counsel to collect claims.

The attorney general may appoint special counsel to represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect.

Such special counsel shall be paid for their services from funds collected by them in an amount approved by the attorney general.

The attorney general shall provide to the special counsel appointed to represent the state in connection with claims arising out of Chapters 5733., 5739., 5741., and 5747. of the Revised Code the official letterhead stationery of the attorney general. The special counsel shall use the letterhead stationery, but only in connection with the collection of such claims arising out of those taxes.

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No. 15-338

In the Supreme Court of the United States

MARK J. SHERIFF; SARAH SHERIFF; WILES, BOYLE, BURKHOLDER & BRINGARDNER CO., LPA; and MICHAEL DEWINE; Attorney General of Ohio,

Petitioners,

–v–

PAMELA GILLIE and HAZEL MEADOWS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MERITS BRIEF OF RESPONDENTS ERIC JONES AND THE LAW OFFICE OF ERIC A. JONES, LLC IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Are special counsel—lawyers appointed by the Attorney General to undertake his duty to collect debts owed to the State—state "officers" within the meaning of 15 U.S.C. § 1692a(6)(C)?

2. Is it materially misleading under 15 U.S.C. § 1692e for special counsel to use Attorney General letterhead to convey that they are collecting debts owed to the State on behalf of the Attorney General?

PARTIES TO THE PROCEEDINGS

Plaintiffs-Appellants below (and Respondents here) are Pamela Gillie and Hazel Meadows.

Respondents in Support of Petitioners here are Eric A. Jones and the Law Office of Eric A. Jones, LLC, who were hired by the state of Ohio as special counsel to collect sovereign debts, along with Petitioners Mark J. Sheriff, Sarah Sheriff, and Wiles, Boyle, Burkholder & Bringardner, Co., LPA. They were co-defendants in the district court (S.D. Ohio, Case No. 2:13-cv-212) and were Appellees in the Sixth Circuit Appeal (6th Cir., Case No. 14-3836). Respondents Eric A. Jones and the Law Office of Eric A. Jones, LLC have also filed a petition for writ of certiorari with docket number 15-620. Ohio Attorney General Mike DeWine (also a petitioner here) successfully moved to intervene in the District Court as an Intervenor-Defendant, and was an Appellee in the Sixth Circuit. Respondents opposed to Petitioners are Pamela Gillie and Hazel Meadows, who sued Eric A. Jones and the Law Office of Eric A. Jones for using the letterhead provided by the Ohio Attorney General for the purpose of collecting sovereign debt.

Defendants-Appellees below (and Petitioners here) are Mark J. Sheriff, Sarah Sheriff, and Wiles, Boyle, Burkholder & Bringardner Co., LPA.

Ohio Attorney General Michael DeWine (also a Petitioner here) successfully moved to intervene in the district court as an Intervenor-Defendant, and was an Appellee in the Sixth Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, the Respondents in Support of Petitioners hereby submit the following corporate disclosure statement:

Respondent in Support of Petitioners the Law Office of Eric A. Jones, LLC has no parent company, and no publicly held company owns 10% or more of it.

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OPINIONS BELOW

The Decision for the United States Court of Appeals for the Sixth Circuit is reported as *Pamela Gillie, et al. v. Law Office of Eric Jones, LLC., et al.* 785 F.3d 1091 (6th Cir. 2015), and copies of the order denying rehearing *en banc* and the Decision are reprinted in the Appendix to the Ohio Attorney General's Petition for Certiorari at 1a and 18a, respectively. The decision of the United States District Court for the Southern District of Ohio is reported as *Pamela Gillie et al. v. Law Office of Eric Jones, LLC., et al.* 37 F.Supp.3d 928, (S.D. Ohio 2014) and is reproduced at OAG Pet.App.77a.

JURISDICTION

The Court of Appeals entered its judgment on May 8, 2015 and subsequently denied a Petition for re-hearing *en banc* on July 14, 2015. The Law Office of Eric A. Jones, LLC and Eric Jones timely filed a petition for writ of certiorari on October 7, 2015 in a separate but related appeal, Supreme Court Case No. 15-620. This Court granted certiorari in this case on December 11, 2015. Because the Law Office of Eric A. Jones, LLC and Eric Jones were both parties before the court of appeals, the Law Office of Eric A. Jones, LLC. and Eric Jones are properly deemed parties entitled to file documents pursuant to Supreme Court Rules 12.6 and 28.4. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- 15 U.S.C. § 1692a(6) provides, in pertinent part:

> (6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f (6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—
>
> * * *
>
> (C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

- **15 U.S.C. § 1692e(9) and (14)** provide, in pertinent part:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> (9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.
>
> * * *
>
> (14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

STATEMENT

The key issues in this case revolve around the scope of the exemption for state "officers and employees" found in 15 U.S.C. § 1692a(6)(C) of the Fair Debt Collection Practices Act (the "FDCPA") as well as the framework for assessing whether a debt collection communication qualifies as "false, deceptive, or misleading" under 15 U.S.C. § 1692e.

Respondents Eric Jones and the Law Office of Eric A. Jones, LLC (collectively the "Jones Respondents")

concur in Petitioner's statement of this case and provide this additional brief in support of Petitioners. Respondent Eric Jones was appointed "special counsel" to the OAG pursuant to Ohio Revised Code (O.R.C.) § 109.08, which states in pertinent part:

> The attorney general may appoint special counsel to represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect.

See O.R.C. § 109.08.

Under the auspices of this appointment, Mr. Jones sent Respondent Pamela Gillie ("Gillie") a letter dated May 24, 2012, seeking recovery of an Ohio State University Medical Center bill. The letter was signed by Mr. Jones as "outside counsel" of the OAG and was written on letterhead of the OAG as required by the OAG. The letter further instructed Gillie to forward payment to the Law Office of Eric A. Jones, LLC (hereinafter "Jones LLC"). *See* OAG Pet.App.14a. Petitioner Mark Sheriff ("Mark Sheriff"), as special counsel for the OAG, sent a similar letter to Respondent Hazel Meadows ("Meadows") on July 20, 2012, seeking recovery of a University of Akron tuition debt. *See* OAG Pet.App.17a. Both beneficiaries, Ohio State University Medical Center and University of Akron, are state entities. At no time did Mr. Jones use the Attorney General's letterhead to collect private debt.

The practice of using special counsel to collect State debts is not a new one, nor is it one that is used

exclusively by the State of Ohio.[1] Attorneys General in the State of Ohio have been using this statutory practice for years, specifically relying upon "special" counsel since the office of the Ohio Attorney General (the "OAG") was created in 1846. *See* 44 Ohio Laws 45, 46 (1846). The particular statute that authorizes the practice (O.R.C. § 109.08) has existed in its current form since 1990. *See* 1989 S 147, effective 1-1-90. Former OAG Richard Cordray used this practice during his tenure, as evidenced by his 2009 annual report.[2] Former Attorney General Jim Petro also used this practice. *See Cleveland State Univ. v. Mills*, No. 2007-01517, Pet. for Removal, Exh. (Ohio Ct. Cls. Jan. 19, 2007)

On March 5, 2013, Plaintiff-Respondents sued Petitioners in the United States District Court for the Southern District of Ohio, Eastern Division, asserting that the Petitioners' and Jones Respondents' use of the OAG's letterhead in these letters violated multiple subsections of 15 U.S.C. § 1692e, including

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[1] The following states also use a similar practice according to their respective state laws: Alabama (Code of Alabama § 36-15-9); Arizona (A.R.S. § 41-2513(B)); Arkansas (Arkansas Code § 25-16-702); California (Cal. Rev. & Tax Code § 19376(b)); Florida (Florida Statutes § 16.015); Georgia (O.C.G.A. § 45-15-12); Indiana (Ind. Code § 4-6-5-3); Iowa (Iowa Code § 13.7); Louisiana (R.S. § 42:262); Mississippi (MS Code § 7-5-7); North Carolina (N.C. Gen. Stat. § 147-17(a)); Texas (Texas Government Code § 402.0212); Virginia (Code of Virginia §§ 2.2-507 and 510); West Virginia (W Va. Code § 6B-1-3(d)); Wisconsin (Wis. Stat. § 14.11(2)(b)).

[2] *See* Ohio Attorney General Annual Report, p.12, retrieved from http://www.ohioattorneygeneral.gov/OhioAttorneyGeneral/files/00/00ab2712-fb34-4dca-b010-2796579b17dd.pdf.

sections 1692e(1), 1692e(9), 1692e(10), and 1692e(14). *See* J.A.35. On December 4, 2013, the District Court ordered the bifurcation of the issues in this case and ordered the parties to submit dispositive motions on the issue of Petitioners' liability. *See* Order, Doc.42, Page ID# 480-484. Plaintiff-Respondents filed Motions for Summary Judgment with supporting documents and affidavits. *See* MSJs, Docs. 48, 49, and 50; Page ID# 570- 890. Petitioner Mark Sheriff and the Jones Respondents also filed Motions for Summary Judgment with supporting documents and affidavits *See* MSJs, Doc.47, Page ID# 522-538 & Doc.51, Page ID# 891-912. All parties filed appropriate responsive and reply briefs.

The District Court granted the Petitioner Mark Sheriff's and the Jones Respondents' motions for summary judgment, finding that (1) special counsel were "officer[s] or employee[s]" of the State of Ohio pursuant to 15 U.S.C. § 1692a(6) (C) and, therefore, not "debt collectors"; and (2) even assuming, *arguendo*, that special counsel were debt collectors, Petitioner Mark Sheriff and the Jones Respondents did not violate the FDCPA. *See* Opinion and Order, Doc.72; Page ID# 1229-1248. The Plaintiff-Respondents' appeal ensued.

On appeal, the Sixth Circuit Court of Appeals reversed, concluding that the District Court had interpreted the FDCPA's "officer" exemption too broadly. Specifically, it reasoned:

> The issue before us is controlled by the scope of the term "officer." Specifically, we must determine whether private attorneys "appointed" as "special counsel" to the Ohio

> Attorney General, but operating as independent contractors, are officers of a state, within the meaning of the FDCPA. We think not. The use of the word "appoint" in reference to "hiring" independent contractors is not decisive. Special counsel, in truth, are indistinguishable from the myriad of independent contractors who enter into for-profit agreements with government agencies or actors to help fulfill the duties of some government office. The FDCPA is a broad remedial statute, *Frey v. Gangwish*, 970 F.2d 1516, 1520 (1992), with limited, clearly defined exceptions. We find no justification for diluting its protection by broadly interpreting the term "officer or employee" to include independent contractors.

See OAG Pet.App.29a. As discussed below, the Sixth Circuit's majority Opinion missed the mark.

In his well-reasoned dissent, Judge Sutton recognized "two serious flaws" in the FDCPA claims. *See* OAG Pet.App.55a.

> One is that the Act exempts state "officers" from its coverage. Under the Dictionary Act and the clear-statement rule established by *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the deputizing of private lawyers to act as assistant attorneys general makes them "officers" of the State for these collection purposes. Any other interpretation would mean that Congress meant to micromanage how a State structured its law enforcement

> and debt-collection efforts and would create grave constitutional concerns along the way.

Id. at 55a-56a. The dissent continued, stating:

> The other flaw is that the special counsels' use of the Ohio Attorney General's stationery and the accurate description of their relationship with the State are not "false and misleading" under the statute. The stationery, which the Attorney General requires each special counsel to use, accurately describes the relevant legal realities—that the law firm acts as an agent of the Attorney General and stands in the shoes of the Attorney General in collecting money owed to the State.

Id. at 56a.

As a result, the Court of Appeals received two petitions for a re-hearing *en banc*; one from the OAG and the Petitioners and the other from the Jones Respondents. The issues that are now on appeal were denied a re-hearing *en banc*, but the petitions did garner a split among the circuit court judges. The denial of *en banc* re-hearing also garnered a dissenting opinion from Judge Sutton, one that was joined by five circuit court judges. *See* OAG Pet.App.7a. Sutton's dissent pointed to four distinct problems with the majority opinion: 1) there is nothing misleading about special counsel's use of the OAG letterhead, as it accurately reflects the principal-agent relationship between special counsel and the OAG; 2) if the use of stationery that accurately reflects the principal-agent relationship is misleading, special counsel will then be forced to use their own

letterhead and assume the risk "that recipients will assume that the letter does not concern a state debt" (*i.e.*, complying with the 6th Circuit majority opinion could lead to confusion in the minds of debtors); 3) the "officer" exemption either applies to special counsel as agents of the OAG or the definition of an "officer" under the FDCPA is ambiguous (as conceded by the plaintiffs), and the clear-statement mandate of *Gregory* requires that the FDCPA is interpreted in a way that does not interfere with the States' debt collection practices; and 4) the Respondents' have "feigned confusion" about whether the letters at issue came from the OAG, but when it came time to interpret the word "officer" found it "quite evident that the letters did not come from the State." *See* OAG Pet.App.7a-11a.

On July 21, 2015, the Petitioners filed their Motion to Stay the Mandate pending resolution of the petition for writ of certiorari and thereafter until this Court disposes of the case. On July 22, 2015, the motion was granted. *See* Order, Doc.77; Page ID# 1293.

On September 15, 2015, the Petitioners filed their petition for a writ of certiorari. This petition was granted on December 11, 2015.

SUMMARY OF ARGUMENT

15 U.S.C. § 1692a(6)(C) excludes from the FDCPA's regulation "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance

of his official duties." Special counsel are officers, appointed by the State. They should be permitted to comply with the State's requirements without fear of liability. The Sixth Circuit's decision directly conflicts with this Court's case law and an analogous circuit level case.

The only analogous circuit-level case to reach this question, *Heredia v. Green*, found that the officer, appointed pursuant to state statute, removable by an authority of the State, and who acted pursuant to orders and instructions of the State, is an Officer of the State and excluded from the regulation of the FDCPA. *See Heredia v. Green*, 667 F.2d 392 (3d Cir. 1981). The Sixth Circuit's decision in this case is in direct opposition to *Heredia*.

This Court has long respected and defined the boundaries of federalism. The clear statement rule, enunciated in *Gregory v. Ashcroft*, requires that a court be "absolutely certain that Congress intended such an exercise" before "displacing weight of federal law to mere congressional *ambiguity." See Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). Use of the clear statement rule has not been relegated to any one area, but instead has been called upon by this Court in regards to a myriad of federal laws. See, *e.g.*, *Gregory* at 460-61 (employment laws); *Kelly v. Robinson*, 479 U.S. 36, 49-53 (1986) (bankruptcy laws); *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 16-18 (1981) (spending grants); *United States v. Bass*, 404 U.S. 336, 349-51(1971) (criminal prohibitions).

The clear statement rule is applicable here. Congress did not intend for the FDCPA to regulate

the collection of a debt owed to a State. The FDCPA illustrates Congressional respect for the bounds of federalism by including an exemption for state "officers" or "employees" who are collecting debt within the bounds of their "official duties." *See* 15 U.S.C. § 1692a(6)(C). The failure to employ the clear statement rule in this case tramples on the sovereign ability of a State to structure its own government, as it relates to the collection of State debts.

Additionally, the Plaintiff-Respondents have attempted to attach liability to the law firms for which special counsel work. But this theory of liability cannot stand where both the principal and agent are not subject to liability. *Freeman v. ABC Legal Services, Inc.*, 827 F.Supp.2d 1065, 1076 (N.D. Cal. 2011) (emphasis added), *citing Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 108 (6th Cir. 1996); *see also Breidenbach v. Experian*, No. 3:12-cv-1548-GPC-BLM, 2013 WL 1010565, *3 (S.D. Cal. Mar. 13, 2013). Here, Eric Jones is not a debt collector and the Law Office of Eric A. Jones, LLC cannot be held vicariously liable under the FDCPA.

Secondly, this case looks at the general standard that applies to a debt collector's communications. This case asks whether special counsel's use of the OAG letterhead was misleading. To be clear, the 6th Circuit reviewed this question under one of the applicable standards,[3] the "least sophisticated consumer" standard. This decision improperly condemns special counsel to liability for telling the

[3] There is currently a split among the circuits regarding the proper general standard for what is "false" or "misleading." This is discussed more fully below.

truth: that he was working as "outside counsel for the Attorney General's Office." *See* OAG Pet.App.14a. The letters provided special counsel's correct contact information. *See Id.* The Plaintiff-Respondents and the 6th Circuit call for special counsel to clear up the "misleading" nature of the communications, by omitting truthful and relevant information (*i.e.* removing the OAG letterhead and reference to the special counsel's association with the OAG). But this course of action would actually mislead because it would fail to identify the real party in interest. Plaintiffs-Respondents failed to provide a remedy that does not deprive debtor of important information.

Specifically, the subject letters allegedly violated 15 U.S.C. § 1692e(9) because they "simulate" or "falsely represent" their "source, authorization, or approval." *See* 15 U.S.C. § 1692e(9). The Jones Respondents admit that the use of the OAG's letterhead creates the impression that th letters are sent under the authority of the OAG. That is not a simulation or false representation because these letters were sent under the authority and will of the OAG. Plaintiffs-Respondents do no claim that special counsel exceeded the scope of their authority under state law. Indeed, the OAG (as Ohio's chief law enforcement officer) has involved himself in this case specifically to support the position that special counsel did not exceed the scope of their authority under Ohio law.

The letters also allegedly violated 15 U.S.C. § 1692e(14) because the names used in the letters are not the "true name" of special counsel. Nothing in that section of the FDCPA prohibits the expressly

authorized use of OAG letterhead. In fact, the use of multiple true names is consistent with the FDCPA so long as that name "does not misrepresent his identity or deceive the consumer." *See* Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,107 (Dec. 13, 1988). As an agent of the OAG, special counsel are required by the OAG to use the OAG's letterhead in correspondence with debtors. Accordingly, even if the FDCPA regulated a state's appointed special counsel, there were no violations of the FDCPA in thi case.

ARGUMENT

I. THE SIXTH CIRCUIT'S DECISION CREATES AN ANOMALY, WITH THE OAG REQUIRING SPECIAL COUNSEL TO USE OAG LETTERHEAD IN POSSIBLE VIOLATION OF FEDERAL LAW

If the Sixth Circuit's Decision is not reversed, Special Counsel who were required to use the OAG letterhead, will be forced to stand trial with a jury to decide whether they violated the FDCPA for simply telling the truth.

The only analogous circuit-level case to reach this question, *Heredia v. Green*, got it right. *Heredia v. Green*, 667 F.2d 392, 394-95 (3d Cir. 1981). *Heredia* properly found that the defendant was an "officer" under 15 U.S.C. 1692a(6)(C). *Heredia* looked at the duties of a Landlord and Tenant Officer under Pennsylvania law, where "each Court may appoint and fix the compensation and duties of necessary

administrative staff " *See* 42 Pa.C.S.A. § 2301(a)(2). Pennsylvania law further provided that "the President Judge of a court shall promulgate all administrative rules and regulations " 42 Pa. C.S.A. § 325(e)(1).

The Defendant, Green, was appointed by the Municipal Court President Judge in accordance with § 2301, and was to "be removed from his position by the President Judge." *See Heredia* at 395. In that position, Green received information from each landlord regarding delinquent tenant and the amount of rent and late charges claimed. *Id.* at 393. He would then create collection notices and serve copies to the tenants. *Id.* The court found that Green was entitled to the "officer" exemption in § 1692a(6)(C) as a court appointed "Landlord and Tenant Officer" when he sent notices to tenants demanding rent, at the request of a municipal court judge. *Heredia* at 393.

In a concurring opinion, one judge concluded that it would be "anomalous" to expose this officer to "monetary liability for deceptively giving the impression that he was acting as an officer of the court despite the fact that his actions had indeed been authorized by that court." *See Heredia* at 396. Likewise here, special counsel collected debts owed to the State of Ohio, where the officer in *Heredia* was simply collecting private debts at the behest of the State. *See Id.* Consequently, special counsel in this case are even more within the definition of the term "officer," as they were collecting debts specifically owed to the State of Ohio. As was pointed out in the concurring opinion in *Heredia*, without the protection of the "officer" exemption in the FDCPA, any party

performing the required responsibilities of special counsel will potentially be left holding the bag.

The Sixth Circuit opinion mistakenly reasoned that "the Landlord and Tenant Officer position was prescribed duties by statute and the holder of the position was not in an independent contractual relationship for the purpose of collecting debts." *See* OAG Pet.App.21a. But such a distinction fails the Sixth Circuit's own test for several reasons. In *Heredia*, the law itself did not authorize the officers to send collection notices, it was the judge who did so. *Heredia*, 667 F.2d at 395. Likewise, here the OAG is authorized to appoint special counsel to collect State debts. *See* O.R.C. 109.08. Furthermore, the statute in *Heredia* did not actually grant the officers collection duties, instead it stated "the President Judge of a court shall promulgate all administrative rules and regulations." *See Heredia* at 395. Here, the Ohio statute specifically provides special counsel with the collection powers of the State and details the use of the OAG's letterhead in connection with the collection of such claims. *See* O.R.C. 109.08. Finally, the Court's opinion fails to recognize the Supreme Court of Ohio's decision in *Solowitch v. Bennett* finding that an independent contractor can also be an officer of the State. *See Solowitch v. Bennett*, 456 N.E.2d 562, 566 (Ohio Ct. App. 1982). In fact, in *Solowitch*, the State of Ohio recognized the Deputy Registrar of the Bureau of Motor Vehicles as both an independent contractor and an officer of the State. *See Id.*

The exemption under § 1692a(6)(C) is broad enough that it encompasses both "officers" and "employees," with the implication that some officers

of a state will not be employees. *See* 15 U.S.C. § 1692a(6)(C). This is that situation. Special counsel are paid as independent contractors of the State of Ohio (albeit ones with the power to enforce civil code on behalf of the State), but are nonetheless "officers" of the State. This understanding of the exemption is narrow enough to recognize that some "officers" or "employees" of a state could have debt collecting duties that are not "in the performance of his official duties." *See Id.* Here, many special counsel may also collect debts as private attorneys for private clients. In that situation, special counsel could not use the OAG letterhead. But when special counsel act within their appointment to collect State debts, they should be permitted to comply with the State's requirement to use the OAG's letterhead. Here, special counsel meet the definition of "officer" of the State of Ohio and should be exempt from the FDCPA.

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S CLEAR STATEMENT CASES

The clear-statement rule was first articulated as such in *Gregory v. Ashcroft* and has since become a mainstay of this Court's cases. *See Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). The *Gregory* Court found that before a court "upset[s] the usual constitutional balance of federal and state powers, Congress must make its intention to do so 'unmistakably clear in the language of the statute.'" *See Id.* at 453. It has since been invoked to determine the application and scope of numerous areas of federal law. See, *e.g.*, *Gregory* at 460-61 (employment laws); *Kelly v. Robinson*, 479 U.S. 36, 49-53 (1986) (bankruptcy laws); *Pennhurst State Sch. and Hosp.*

v. Halderman, 451 U.S. 1, 16-18 (1981) (spending grants); *United States v. Bass*, 404 U.S. 336, 349-51 (1971) (criminal prohibitions).

The clear-statement rule prohibits the application of a federal statute, which purports to regulate a core state function, unless Congress does so unambiguously. First, under the applicable definition of the term "officer," the FDCPA does not apply to special counsel. If nothing else, the definition of the term "officer" is at least ambiguous. For these reasons, the failure to apply the clear-statement rule trenches on a state's ability to arrange the conduct of its own government. Once the clear-statement rule has been applied (and Eric Jones is found to be an "officer"), Jones LLC cannot be held vicariously liable under the FDCPA.

A. The Fair Debt Collection Practices Act Does Not Apply to Special Counsel

The FDCPA prohibits "debt collectors" from using a "false, deceptive, or misleading representation or means in connection with the collection of any debt." *See* 15 U.S.C. § 1692e. The FDCPA also includes an exemption for "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." *See* 15 U.S.C. § 1692a(6) (C). As the FDCPA does not define the term "officer," the Dictionary Act provides the proper federal definition. It defines an "officer" as "any person authorized by law to perform the duties of the office." 1 U.S.C. § 1. Special counsel fall directly within this definition. The 6th Circuit parsed the phrases

"authorized by law" and "the duties of the office," and in doing so, lost its way.

To "authorize" something is simply "[t]o give legal authority," "to empower" or "to sanction." *Black's Law Dictionary*, (10th ed. 2014). Ohio Rev. Code § 109.08 does exactly that. It empowers the OAG to "appoint special counsel to represent the state." *See* Ohio Rev. Code § 109.08. Without this statute, the OAG would not have the power or legal authority to hire or appoint private attorneys to do such work on behalf of the State. *See Id.* The 6th Circuit was too concerned with the independent contractor relationship. Independent contractor vs. employee is a distinction without a difference because the empowerment and authority to act are the same. It is clear that special counsel are "officers."

Specifically, the 6th Circuit Opinion voiced concern with the fact that the particulars of the OAG's relationship with special counsel are also governed by a Retention Agreement, but this is a distinction without a difference. Of course there is a vehicle by which the OAG selects and governs the private attorneys that will represent his office and the State itself, but this does not change the fact that § 109.08 is the power by which the OAG can "authorize" those agreements in the first place. Additionally, this is yet another parallel between this case and *Heredia*, where the state court judge in *Heredia* was required to promulgate rules and regulations that would govern the relationship of the court and the officer as well. *See Heredia* at 395.

Turning to the phrase "the duties of the office," an "office" can be defined as a "position whose occupant

has legal authority to exercise a government's sovereign power for a fixed period." *Black's Law Dictionary*, (10th ed. 2014). Here, special counsel are appointed to statutorily created positions to exercise government power for one-year renewable periods. *See* OAG Pet.App.57a. Additionally, special counsel have the power to enforce Ohio's civil code as it relates to debts owed to the State. The power to create and enforce the civil code is a quintessential function of the State. *See Diamond v. Charles*, 476 U.S. 54, 65 (1986); *Alfred L. Snapp & Son, Inc. v. Puerto Pico, ex rel., Barez*, 458 U.S. 592, 601 (1982); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 692 (6th Cir. 1994). It is this empowerment and authority to act that distinguishes special counsel from other independent contractors working for the State. As the 6th Circuit dissenting opinion noted:

> The Ohio Facilities Construction Commission, cited by the majority in support of plaintiffs' view, proves the point: There is nothing "sovereign" about the power to "construct[] and repair" a state agency's buildings, Ohio Rev. Code § 123.21, and sovereign power remains a precondition of officer status.

See OAG Pet.App.62a.

Here, special counsel are appointed by the OAG (with legal authority), to statutorily created positions, for one-year periods of time. *See* OAG Pet.App.57a. The 6th Circuit created a fiction by requiring that special counsel carry out <u>all</u> of "the" duties of the office of the OAG. *See* OAG Pet.App.35a. The office or position defined here is not the office of the OAG, but rather the office of special counsel that is created

by law. *See* Ohio Rev. Code § 109.08. Special Counsel are appointed to handle specific duties of the OAG. Within those specific duties, special counsel are carrying out "the" duties for which they are appointed.

Finally, the State of Ohio defines the term officer in the same way as the Dictionary Act. The Supreme Court of Ohio has found that "[T]he chief and most decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law." *Engel v. Univ. of Toledo Coll. of Med.*, 957 N.E.2d 764, 768 (Ohio 2011). So, the idea that a party may be an independent contractor does not exclude him from also being an officer of the State. *See Solowitch v. Bennett*, 456 N.E.2d 562, 566 (Ohio Ct. App. 1982). In fact, in *Solowitch*, the State of Ohio recognized the Deputy Registrar of the Bureau of Motor Vehicles as both an independent contractor and an officer of the state. *Id.* Here, special counsel meets the definition of an "officer" of the State of Ohio and should be exempt from the FDCPA.

Despite this, the 6th Circuit found that "[t]he overwhelming weight of authority sensibly finds that independent contractors are not exempt from FDCPA coverage as officers or employees pursuant to 15 U.S.C. § 1692a(6)(C)." In support of this finding, the 6th Circuit cites to *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1263 (9th Cir. 1996), where the question before the Court was whether USA Funds, a private, non-profit organization was exempt as an "officer or employee of the United States." *See Brannan, supra. Brannan* found that

USA Funds was not exempt, but only because there was no exemption for private, non-profit entities. Specifically absent from the opinion in *Brannan* is any holding that would help define an "officer of any State," which is the relevant question here.

The 6th Circuit also cited to another series of cases supposedly in support of the proposition that an entity in contract with the state is not exempt as "officers" or "employees" of the state. *See* OAG Pet.App.37a. Notably, the Jones Respondents are not asking this Court to define any entity as an officer of the state, but rather that the natural persons appointed as special counsel should be considered officers of the state.

The 6th Circuit cases are distinguishable as follows. In *Pollice v. National Tax Funding, L.P.*, 225 F.3d 379 (3d. Cir. 2000), a municipal government sold its debt to a debt collector, precluding a finding that the third party debt collector was an "officer" or "employee" of the state. *See Pollice* at 389. Likewise, in *Piper v. Portnoff Law Assocs.*, 274 F. Supp. 2d 681, 688 (E.D. Pa. 2003), the court merely cited to the *Pollice* case for the proposition that the "government employee exemption 'does not extend to those who are merely in a contractual relationship with the government.'" *See Piper* at 688 quoting *Pollice* at 406. Finally in *Gradisher v. Check Enforcement Unit, Inc.*, 133 F.Supp.2d 988 (W.D. Mich. 2001), the court found that a private entity that is in contract with the government, cannot be considered an "officer."

Those cases do not apply here for several reasons. Special counsel are specifically appointed in accordance with Ohio law. *See* O.R.C. § 109.08.

Furthermore, such a relationship is "personal in nature and does not extend to any law firm that the Special Counsel is associated with." *See* J.A.171. The *Pollice* case does not apply because the court in that case was analyzing a debt that was no longer owned by a government entity, but had in fact been sold, where here special counsel are collecting debts owned by the State. The *Piper* case is inapplicable because special counsel are not "merely" in a contractual relationship with the government: special counsel are appointed pursuant to statute, and the relationship between special counsel and the OAG is further clarified by means of the Retention Agreement. Furthermore, the holding in *Piper* was only in regards to an entity (a law firm), while the relationship between special counsel and the OAG is "personal in nature." *See* J.A.171.

The *Gradisher* case is inapplicable for the same reason. The court found that CEU, a private entity in a contractual relationship with the government, was unable to be considered as a "government agenc[y] or employee." [4] *See Gradisher, supra* at 992. Noticeably absent from this analysis is whether a person (appointed under state law) that is in contract with the state government can be considered an officer.

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[4] It should be noted that the discussion about the liability of an entity under the FDCPA is very intertwined with the argument regarding the vicarious liability of an entity if the principal of that entity is exempt from FDCPA liability. This argument is addressed below in Section II.d.

B. The FDCPA Definition of the Term "Officers" Is, At Least, Ambiguous

The clear-statement rule is one "of statutory interpretation, to be relied upon only when the terms of a statute allow." *See United States v. Lopez*, 514 U.S. 549, 611 (1995); *see also United States v. Culbert*, 435 U.S. 371, 379–380 (1978); *Gregory v. Ashcroft*, *supra*; *United States v. Bass*, *supra*, 404 U.S., at 346–347, 92 S.Ct., at 521–522. *Gregory* stated:

> [W]e are not looking for a plain statement that judges are excluded. We will not read the ADEA to cover judges unless Congress has made it clear that judges are included. This does not mean that the Act must mention judges explicitly. Rather, it must be plain to anyone reading the Act that it covers judges. In the context of a statute that plainly excludes most important state public officials, "appointee on the policymaking level" is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges. Therefore, it does not.

See Gregory, *supra* at 467.

Here, special counsel are clearly officers of the State of Ohio according to the Dictionary Act definition of the term. For the sake of argument though, even if it is ambiguous as to whether special counsel are "officers," this only bolsters the argument for application of the clear-statement rule, as Congress' intentions are not "unmistakably clear in the language of the statute.'" *See Gregory*, *supra* at 453. Indeed, Plaintiff-Respondents have even conceded

that this term is "ambiguous" and "open to multiple[] yet reasonable interpretations." *See* Respondents' Reply Brief to Appellees' Principal Briefs at 5, Doc. 38, Page ID #12. This admission should be the end of the case, as *Gregory* requires that when Congress purports to regulate core state functions (of which collecting State debts is one), it must do so unambiguously. *Gregory*, 501 U.S. at 470. As stated in the dissenting 6th Circuit opinion:

> [t]he *Gregory* clear-statement admonition bars courts from construing ambiguous federal statutes to "trench on the States' arrangements for conducting their own governments." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004). The States' sovereign authority gives them power to structure their legal departments as they please, and their "varied" and "pragmatic" approaches have produced a "staggering[ly] divers[e]" array of governance arrangements. *Avery v. Midland Cnty.*, 390 U.S. 474, 482-83 (1968).

See OAG Pet.App.58a. The Plaintiff-Respondents inability to state "that the statute is unambiguous in their favor" (Respondents' Reply Brief to Appellees' Principal Briefs at 5, Doc. 38, Page ID #12) means that the term "officer" does include special counsel in this case. *See Gregory*, *supra* at 467.

The 6th Circuit decision attempts to sidestep this entire argument by claiming that "Ohio is not being regulated; nor is the structure of its government being challenged." *See* OAG Pet.App.39a. As seen below, this statement is both incorrect and irrelevant.

It is incorrect because the collection of debt is considered a core sovereign activity. It is irrelevant because the application of the clear-statement rule has never been limited to laws that "regulate" a State or where the "structure of its government is challenged."

C. Failure to Apply the Clear Statement Rule Trenches on the States' Arrangement for Conducting Their Own Government

The understanding in *Gregory* is based upon the fact that "[t]he Constitution created a Federal Government of limited powers. 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'" *See Gregory, supra* at 457 citing to U.S. Const., Amend. 10. "Among the background principles of construction that our cases have recognized are those grounded in the relationship between the Federal Government and the States under our Constitution." *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014). Federal statutes "cannot be construed without regard to the implications of our dual system of government." James Madison correctly defined the advantages of such a system, stating:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of

> the people, and the internal order, improvement, and prosperity of the State.

See the *Federalist No. 45*, pp. 292-293 (C. Rossiter ed. 1961). This "delicate balance" does allow the Federal Government to legislate in areas that are traditionally regulated by States. *See Gregory*, *supra* at 460. But because it is such an "extraordinary power," the court "must assume Congress does not exercise [it] lightly." *See Id.* Indeed, "[f]ederal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires." *See Nixon v. Missouri Muni. League*, 541 U.S. 125, 140 (2004).

In this context, there are certain "fundamental state legislative prerogatives" through which a "state defines itself as a sovereign." *See Gregory*, *supra* at 460; *see also Lopez*, *supra* at 610. These prerogatives of a sovereign state have manifested themselves in many ways, including that debts owed to the state were "paid before the debts owed other creditors" (*see United States v. Moore*, 423 U.S. 77, 80 (1975)) and the common law tradition that debts owed to the state were not discharged in bankruptcy (*see Commonwealth v. Hutchinson*, 10 Pa. 466, 467-68. (Pa. 1849); *People v. Herkimer*, 4 Cow. 345, 346-67 (N.Y. Sup.Ct. 1825)). Indeed, "there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts

due to the crown " *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1856).

Here, Ohio's prerogative to choose special counsel over a given State employee is no less the prerogative of the State than the option to choose between state and local employees. *See City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 437 (2002). As government "is the science of experiment a State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978). Specifically, the Attorney General has had (and exercised) the authority to hire special counsel longer than the office has had the authority to hire employees. *See* 97 Ohio Laws at 60, *compare with* 107 Ohio Laws at 504.

As the exercise of this State prerogative, the OAG correctly found that special counsel are "authorized by law" and therefore an officer of the State. The 6th Circuit concluded that such a reading of the definition of the term "officer" in the Dictionary Act "would invite a preposterous result," where "every independent contractor working on behalf of a state" would be "bestow[ed] officer status under the Dictionary Act." *See* OAG Pet.App.33a-34a.

To prove this point, the 6th Circuit looked to the Ohio Facilities Construction Commission and its Executive Director, which are responsible for "general supervision over the construction of any projects, improvements, or public buildings constructed for a state agency." *See* Ohio Rev. Code § 123.21(2). Under that example, the 6th Circuit found that all

independent contractors hired by the Executive Director for work on construction projects would be officers of the State. But this analogy is flawed. An attorney appointed as special counsel is an "officer" of the State because she is responsible for enforcing Ohio's civil code as it relates to debts owed to the State. *See* O.R.C. § 109.08. The power to enforce the civil code is a quintessential function of the State. *Diamond v. Charles*, 476 U.S. 54, 65 (1986); *Alfred L. Snapp & Son, Inc. v. Puerto Pico, ex rel., Barez*, 458 U.S. 592, 601 (1982); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 692 (6th Cir. 1994). Even if special counsel are considered independent contractors for some purposes, the ability to enforce the State's civil code is the distinction that makes special counsel different than any other party that simply contracts with the State. As the dissenting 6th Circuit opinion pointed out:

> The Ohio Facilities Construction Commission, cited by the majority in support of [respondent]s' view, proves the point: There is nothing "sovereign" about the power to "construct[ ] and repair" a state agency's buildings, Ohio Rev. Code § 123.21, and sovereign power remains a precondition of officer status.

See OAG Pet.App.63a (emphasis added). Special counsel's sovereign power to enforce the civil code separates it from the "preposterous result" that is contemplated by the 6th Circuit. Accordingly, special counsel should be afforded the protection afforded by the FDCPA's officer exemption.

D. Respondent Jones LLC Cannot Be Held Liable for Respondent Jones' Acts If Respondent Jones Is Exempt from the FDCPA

The 6th Circuits decision makes numerous references to the fact that the position of special counsel is "personal in nature." *See* OAG Pet.App.24a & 52a. While this may be true, it is not dispositive regarding the liability of Respondent Jones LLC. "Although the FDCPA does not expressly address vicarious liability, courts have held that vicarious liability may obtain where both parties are debt collectors." *Freeman v. ABC Legal Services, Inc.*, 827 F.Supp.2d 1065, 1076 (N.D. Cal. 2011) (emphasis added), *citing Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 108 (6th Cir. 1996); *see also Breidenbach v. Experian*, No. 3:12-cv-1548-GPC-BLM, 2013 WL 1010565, *3 (S.D. Cal. Mar. 13, 2013) ("vicarious liability may only be imposed if both the principal and the agent are debt collector as defined by the FDCPA").

By naming Jones LLC as a defendant in this case, Respondents attempted to circumvent Jones' official state position by attaching liability to Jones LLC for actions Jones took in his capacity as special counsel. Respondents acknowledge that the alleged violations were committed by Jones "in his role as 'special counsel' to the Ohio Attorney General." (Complaint, Doc.1, Page ID#1-20), at ¶ 43). As discussed previously, Respondent Jones is not a debt collector under the FDCPA when acting in his role as special counsel to the OAG. Accordingly, Respondent Jones LLC cannot be held vicariously liable for Jones' acts since he is not a debt collector.

III. THE COMMUNICATIONS WERE NOT FALSE OR MISLEADING UNDER 15 U.S.C. § 1692e

Even if the FDCPA could somehow be stretched to cover the actions of special counsel in this case, Plaintiff-Respondents are unable to show that there was a violation of the FDCPA.[5] Respondents have claimed that the letters sent to them violated §§ 1692e(9) ("use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval") and 1692e(14) ("[t]he use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization."). Despite the fact that there is a circuit split regarding the general liability standard for debt collector communications,[6] the 6th Circuit used the "least

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[5] It should be noted that recent case law from this Court found that the government's regulation of speech is content based, and therefore subject to strict scrutiny, when the regulation makes "facial distinctions based on a message" such as speech that is "regulated by particular subject matter" or by "particular subject matter." *See Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2227 (June 18, 2015). Because the FDCPA cannot be "justified without reference to the content of the regulated speech," it is subject to strict scrutiny as it relates to the First Amendment to the Constitution. *See Id.* at 2226.

[6] Some courts have analyzed communications from the perspective of an "unsophisticated consumer" *See Strand v. Diversified Collection Serv., Inc.*, 380 F.3d 316, 317-18 (8th Cir. 2004); *Gammon v. GC Servs. Ltd. P'ship*, 27 F.3d 1254, 1259-60 (7th Cir. 1994) (Easterbrook, J., concurring). While others have made use of the "least sophisticated consumer" test correct. *See*

sophisticated consumer" standard. *See* OAG Pet.App.48a. The 6th Circuit provides a standard that is hardly exact and appears to create more questions than it answers, proving the consequences when courts interpret the "least sophisticated consumer" test in order to reach consumers on "the very last rung on the sophistication ladder." *Gammon*, 27 F.3d at 1257 Despite the lack of clarity in the standard provided by the 6th Circuit, special counsel's use of the OAG's letterhead did not violate the actual language of the FDCPA, and the 6th Circuit's decision should be overruled.

A. Failure to Show a Violation of 15 U.S.C. § 1692e(9) or (14)

The Sixth Circuit first stated that the subject collection letters "violated [the FDCPA] in the technical sense" because "Mike DeWine is not the true name of any Defendants" and "the official letterhead certainly implied that the letter was issued by the OAG." *See* OAG Pet.App.48a. Although the Sixth Circuit did not indicate that these technical violations were necessarily "material," it does indicate the Court's misunderstanding of the facts of this case. Mike DeWine may not be a Defendant in this case, but the letters in this case were issued by

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Lesher v. Law Offices of Mitchell N. Kay, PC, 650 F.3d 993, 1002-03 (3d Cir. 2011); *Pettit v. Retrieval Masters Creditor Bur., Inc.*, 211 F.3d 1057, 1060 (7th Cir. 2000) ("we have rejected the 'least sophisticated debtor' standard used by some other circuits"). Another circuit has called such a difference "de minimis" but the distinction between such tests becomes obvious when examined in a more specific context. *Peter v. GC Servs. L.P.*, 310 F.3d 344, 348 n.1 (5th Cir. 2002).

special counsel as a direct result of the Attorney General conferring the authority of the State of Ohio. It is immaterial that the letter was actually sent by special counsel, as the letters were sent at the express direction of the OAG.

But the court's factual misunderstanding does not end here. The 6th Circuit opinion continues, stating "[t]he presence of the authoritative symbols at the top of the letter immediately signals to the debtor that it is the State of Ohio that is threatening to take action against her." This is exactly the point. The State of Ohio is taking action against her. Instead of seeing this action for what it is, the 6th Circuit opinion claims that the sole purpose in using the OAG letterhead is "intimidation." *See* OAG Pet.App.45a. Additionally, the 6th Circuit found that "there was also some indication that the attorney's role as a debt collector was separate and apart from the OAG." *See* OAG Pet.App.49a. Lastly, the 6th Circuit found that a jury could reasonably find that special counsel's use of the OAG's letterhead violates 15 U.S.C. § 1692e(14). *See* OAG Pet.App.51a

When Jones is operating in his official capacity as special counsel, he may mention several "true names"–his own name, that of the OAG to whom he has been appointed to serve, and that of his private business which provides him with office space. In fact, the use of multiple names is consistent with the FDCPA so long as that name "does not misrepresent his identity or deceive the consumer." *See* Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,107 (Dec. 13, 1988).

In this context, it is logical that the letter would appear on OAG letterhead, contain Jones' individual name and position with the OAG in the signature block, and provide the name and address (the LLC) where the debtor can obtain more information and send payment. This is no different than how a letter from an in-house Assistant OAG "employee" might appear–the individual writing the letter would use OAG letterhead, list his own name and position with the OAG, and direct the debtor where to send payment. No one would argue that the in-house Assistant OAG employee was not using his "true name" when he used OAG letterhead.

Instead, the 6th circuit found that because Jones' contract designates him an independent contractor for compensation purposes, he is not entitled to the same affiliation. But Ohio statutes clearly dictate that Jones is appointed by the OAG pursuant to statute (O.R.C. § 109.08), and that, whether "appointed *or* employed," Jones is a "civil servant" of the state when he is acting as special counsel (O.R.C. § 124.11(A)(11)). *See also Berridge v. Heiser*, 993 F.Supp. 1136, 1140 & 1143-44 (S.D. Ohio 1997) (special counsel for the OAG, appointed under O.R.C. 109.08, treated as a public official); *Solowitch*, 8 Ohio App.3d at 117-118 (deputy registrar treated as state officer despite contractual nature of relationship). In other words, for purposes of the statutory duties he carries out as special counsel, Jones is just as much affiliated with the OAG as an in-house employee is.

Special counsel's use of the OAG's letterhead did not violate the FDCPA. In *Heredia v. Green*, 667

F.2d 392, 395 (3rd Cir. 1981), discussed above, the defendant sent notices to tenants, which contained the municipal court's seal and the words "Landlord & Tenant Officers of Municipal Court." *Id.* at 393. Similar to the instant case, the notices demanded payment at the defendant's personal office. *Id.* The municipal court "specifically authorized" the defendant to use the notice at issue. *Id.* at 395. The Third Circuit found such notices to be lawful. As the court noted, the notice's legitimate purpose was "to impress upon tenants that the municipal court is involved, to assure the tenant's attention and prompt response, and to explain clearly [the consequences]." *Id.* at 396.

Likewise here, special counsel are appointed by the OAG pursuant to statute. The OAG not only authorizes, but requires special counsel to use the OAG's letterhead. If Jones failed to use the OAG's letterhead, he would not only violate the orders of the OAG he was appointed to serve (Complaint, Doc.1, Page ID# 1-20, at ¶ 7), but he would fail to serve the governmental interests he was appointed to protect. As in *Heredia*, failure to use the OAG's letterhead would give the debtors a false impression, as this would not impress upon debtors the OAG's involvement in collecting their debts.

In *Gradisher v. Check Enforcement Unit, Inc.*, 210 F.Supp.2d 907 (W.D. Mich. 2002), the defendant (CEU) entered into a contract with the County of Muskegon to provide services for the recovery of dishonored checks. *Id.* at 910. In providing these services, CEU sent notices to debtors using the letterhead and envelopes of the county sheriff's office,

which were supplied by the sheriff's office. *Id.* However, the sheriff's department neither oversaw nor supervised CEU's activities. *Id.* One of these debtors sued CEU under sections 1692e(1), (9), and (14). *Id.* at 914. In holding for the plaintiff, the court reasoned that even though CEU was affiliated with the Sheriff's Department, the notices violated sections 1692e(9) and e(14), though not e(1):

> [The notices] all conveyed the impression that they were authorized, created, and sent by the Sheriff's Department without any indication that CEU, an independent contractor of the County, was actually the entity that generated the notices. This result was accomplished both by using Sheriff's Department letterhead and by omitting any reference to CEU.

Id. (emphasis added). In other words, the court in *Gradisher* found a violation not because CEU used Sheriff's Department letterhead, but because CEU did so without revealing its own role in the creation of the letters. *Id.*

That simply is not the case here. In fact, the 6th Circuit and Plaintiffs-Respondents in this case appear to advocate the exact activity that resulted in the violations in *Gradisher*. Additionally, unlike in *Gradisher*, special counsel not only have a contractual relationship with the OAG, but are actually appointed, by statute. Special counsel are unclassified civil servants, not simply outside contractors. *See* O.R.C. § 124.11(A)(11). Moreover, unlike *Gradisher*, Jones clearly identified his and his law firm's role–he used his law office's return

address on the envelope, signed his name to the letter, and referred to himself, truthfully, as "outside counsel" to the OAG. The only reference to the OAG was in the letterhead, which the OAG not only supplied, but required Jones to use. One court in the 6th Circuit recently distinguished *Gradisher* for similar reasons. *See Golem v. Palisades Acquisition XVI, LLC*, No. 1:11CV02591, 2012 WL 2995480, *3 (N.D. Ohio July 23, 2012) (rejecting claim that law firm's use of caption stating "Berea Municipal Court" was misleading, because the document indicated it was sent by and directed questions to the law firm).

Simply put, then, there is nothing misleading in Jones' use of his own name, his firm's name, and the OAG's letterhead in his letter to Gillie. To allege that special counsel like Jones cannot mention all three names is disingenuous. If Jones had placed the OAG's name and address on the envelope and in the signature line of the letter, Appellants undoubtedly would have alleged a violation on facts very similar to those in *Gradisher* (though they still would have to address the obvious distinction that the defendants in *Gradisher* were not appointed by statute to official positions). If Jones did not use the OAG's letterhead, as required by the OAG, he also would not be truthfully representing the primary party interested in the collection of the debt. Indeed, the use of these names actually serves to clarify exactly who Jones is (outside counsel for the OAG), for whom he works and is affiliated (the OAG), and to whom Gillie was to send her payment (Jones' law office). Failure to use the OAG's letterhead would place the Respondents under the misapprehension that the OAG was not involved.

Not only was nothing in the Jones letter false, but it was certainly not materially misleading. To show a material misrepresentation, a plaintiff must identify how they relied on the misleading statement. In *Wallace v. Washington Mut. Bank, F.A.*, the Sixth Circuit explained that the misidentification of the creditor in that case could be misleading because the plaintiff alleged it actually caused "confusion and delay in trying to contact the proper party concerning payment." 683 F.3d 323, 327 (6th Cir. 2012). In this case, the letter specifically identified whom Gillie should call concerning payment and where to direct payment.

The 6th Circuit analysis incorrectly stated that the State, and thus any party acting as special counsel on behalf of the State had no "special authority that a regular creditor does not." *See* OAG Pet.App.45a. But the State of Ohio has many authorities that are not granted to a private debt collector after receiving judgment. These include the right to apply a debtor's income-tax refund in satisfaction of a debt (*see* O.R.C. § 5747.12), statutes of limitation do not run against the State unless they expressly say so (*see Ohio Dep't of Transp. v. Sullivan*, 38 Ohio St. 3d 137, 140 (1988); O.R.C. § 2329.07(A)), receipt of priority in probate (*see* O.R.C. § 2117.25(A)(8), and required use of lottery prizes exceeding $5,000 to pay debts certified to the Attorney General (*see* O.R.C. § 3770.073(A)).

The Sixth Circuit Opinion in this case only adds to the confusion, finding that "[t]he presence of the authoritative symbols at the top of the letter immediately signals to the debtor that it is the State

of Ohio that is threatening to take action against her" (*See* OAG Pet.App.49a), and that "[u]se of the letterhead, in our view, is intended to induce a higher rate of repayment by intimating that the State of Ohio is in fact sending the letter." *See Id.* at 34a. But only a bizarre and idiosyncratic understanding of the letter could bring a reader to these conclusions because "special counsel are the Attorney General's agents, authorized to stand in his place when collecting Ohio debts." *See Id.* at 63a. As these are debts that are owed to the State and special counsel are working on behalf of the Attorney General, "[n]ot even the least sophisticated consumer could infer anything from these letters other than the reality that these were indeed state debts." *Id.* at 54a (Sutton, J., dissenting).

The alleged misrepresentation in this case, who actually prepared the letter, is immaterial. Whether or not special counsel are exempt from the FDCPA, their relationship with the Attorney General under Ohio law enables them to represent themselves as arms of the Attorney General's office. Because Jones' use of the OAG's letterhead was neither false nor materially misleading, and because the letters in this case are not subject to more than one reasonable interpretation, the District Court properly granted summary judgment in favor of Appellees Jones and Jones LLC, and the 6th Circuit's decision should be overruled.

CONCLUSION

Accordingly, the decision of the 6th Circuit Court of Appeals should be reversed and the District court should be directed to enter summary judgment in favor of the Petitioners and Jones Respondents.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MARK J. SHERIFF, ET AL.,
Petitioners,

v.

PAMELA GILLIE AND HAZEL MEADOWS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS PAMELA GILLIE AND HAZEL MEADOWS

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QUESTIONS PRESENTED

The Fair Debt Collection Practices Act ("FDCPA") protects consumers from deceptive and abusive debt collection practices. The Ohio Attorney General contracts with private debt collectors—called "collections special counsel"—to assist in the collection of consumer debt. They are not the Attorney General's employees, but lawyers in private law firms, with their own office space and other clients.

The questions presented are as follows:

1. Was the court of appeals correct in rejecting the argument that debt collectors are exempt from all the FDCPA's restrictions whenever their client is a public entity, on the theory that that makes them "officers" of the State of Ohio within the meaning of the FDCPA, 15 U.S.C. § 1692a(6)(C)?

2. The Act states that it "is a violation" when a debt collector "simulates ... a document ... issued ... by" a state official, 15 U.S.C. § 1692e(9), or "use[s] ... any ... organization name other than the true name of [her own] business," *id.* § 1692e(14). Was the court of appeals correct in concluding that debt collectors violate the Act when they write dunning letters on Ohio Attorney General letterhead?

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INTRODUCTION[1]

Like many businesses, the State of Ohio enlists debt collectors from the private market to collect debts from consumers who buy goods or services from a state enterprise. Ohio's Attorney General engages these "collections special counsel" solely by contract, and they perform services "solely on an independent contractor basis." JA 173. The contracts disclaim any employment relationship. They require collections special counsel to pay out of pocket for their own office space, expenses, and employees. They prohibit special counsel from using the Attorney General's logo on business cards. These debt collectors typically perform the same services for other creditors. The only way collections special counsel get paid is by pocketing as much as a third of any debt they collect.

In enacting the Fair Debt Collection Practices Act, Congress recognized that outside debt collectors with these sorts of arrangements are prone to "egregious collection practices" because they are not restrained by a creditor's "desire to protect [its] [own] goodwill" and are paid only on commission. S. Rep. No. 95-382, at 2 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1696. Thus, the Act applies broadly to outside debt collectors, but in two nearly

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[1] The brief filed by Petitioners Ohio Attorney General and Mark and Sarah Sheriff and their firm is cited as "Pet. Br." The brief filed by Eric A. Jones and his firm (formally Respondents, but aligned with Petitioners) is cited as "Jones Br." For ease of reference, Gillie and Meadows are referred to as "Respondents" and the Jones parties as "Jones." Unless otherwise indicated, citations to statutory provisions are to 15 U.S.C.

identical and neighboring provisions, it exempts any "officer or employee" of a private business, and any "officer or employee" of a State, who collects debts as part of her "official duties." § 1692a(6)(A), (C). The Ohio Attorney General originally recognized that collections special counsel fall on the outside-debt-collector side of this divide: He contractually requires them to comply with the FDCPA. JA 162-63.

But now that collections special counsel have been accused of violating the FDCPA, the Attorney General has had second thoughts—lots of them. Now collections special counsel are officers of the State of Ohio, notwithstanding the carefully worded contracts that say otherwise—which means that they remain free to engage in all manner of abusive practices whenever their client is a public enterprise. Now it threatens Ohio's sovereignty to hold collections special counsel to the FDCPA's minimum standards of conduct, even though the Attorney General has long required them to do so by contract.

The Attorney General was right the first time, as the court of appeals correctly held. Outside debt collectors do not become "officers" of the State of Ohio just because the creditor for a particular debt happens to be a public enterprise.

On the merits, Petitioners draw a similarly untenable distinction between the letters debt collectors write for private versus public entities. Petitioners conceded that an outside debt collector who sends a dunning letter on IBM's letterhead violates the Act, even if IBM authorizes it. They had to

because that conduct falls squarely within the prohibition declaring it "is a violation" of the Act when an outside debt collector "use[s] ... any ... organization name other than the true name of [their own] business." § 1692e(14). Yet, somehow, Petitioners claim, the result is different when they do the same on Ohio Attorney General letterhead.

The Act draws no such distinction. In fact, the conduct here is even worse, because a dunning letter on Attorney General letterhead also "simulates ... a document ... issued ... by" a state official. § 1692e(9). The conduct here violates both provisions because collections special counsel are not the Attorney General or his office.

The State nevertheless protests that it is not materially misleading when a debt collector uses the Attorney General's letterhead with authorization. But when Congress announces that conduct "is a violation," a court is not free to carve out an exception because it concludes that the result does not advance Congress's objectives. In any event, Petitioners made another concession that dooms their position: The reason Petitioners want debt collectors to use the Ohio Attorney General's letterhead is "to get the debtor to prefer the debt with the state over and above his other debts." JA 416-17. So the letterhead *does* affect debtor conduct. The impression the debt collectors foster is misleading: There are many reasons why a particular consumer should not prefer a debt to some public entity over, say, rent or car payments.

This Court should affirm.

STATEMENT OF THE CASE

Congress Enacted The FDCPA To Eliminate Abusive Practices By Outside Debt Collectors

Congress enacted the FDCPA to "eliminate abusive debt collection practices, to ensure that debt collectors who abstain from such practices are not competitively disadvantaged, and to promote consistent state action to protect consumers." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 577 (2010). The Act prohibits debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt," and enumerates various practices that are per se misleading. § 1692e. It also prohibits debt collectors from engaging in a variety of other abusive practices, such as threatening imprisonment, § 1692e(4), and incessant phoning "with intent to annoy, abuse, or harass," § 1692d(5). The Act imposes civil liability for violations. § 1692k.

The Act does not exempt debt collectors who collect debts on behalf of a state-owned enterprise. Even so, Congress limited the scope of the Act in two significant respects. The Act applies only to consumer debt, § 1692a(5)—i.e., situations where a business (whether it be state owned or privately owned) enters the marketplace to sell goods or services to consumers. Tax debts are not covered. Nor are commercial debts.

The Act also applies only to *outside* debt collectors—those who regularly collect "debt[s] owed ... *another*." § 1692a(6) (emphasis added). Congress

regulated outside debt collectors for two reasons. First, "[u]nlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them." S. Rep. No. 95-382, at 2; Pet. App. 21a. Second, outside debt collectors are often paid only on commission—taking a significant cut of whatever they recover. They thus have every incentive to "press the boundaries of the Act's prohibitions on collection techniques." *Jerman*, 559 U.S. at 602; *see* S. Rep. No. 95-382, at 2 (outside debt collectors' commission-based pay incentivizes them to use "any means" to collect a debt); Pet. App. 21a. A creditor's own in-house personnel, by contrast, are subject to different incentives.

These two differences apply whether the creditor is a public entity or a private company. Therefore, the term "debt collector" does not include—and the Act does not apply to—"(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor" or "(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." § 1692a(6)(A),(C).

The Ohio Attorney General Contracts With Outside Debt Collectors To Collect Consumer Debts

1. In Ohio, debts owed to state entities that are 45 days past due are "certif[ied] ... to the attorney

general." Ohio Rev. Code Ann. § 131.02(A). All certified debts are entered into an electronic database. JA 123. From the database, most debts are first forwarded to the Attorney General's "in-house collection staff." JA 124. If they do not succeed, the database forwards the debt to outside debt collection agencies called Third Party Vendors. JA 124, 330. Next in line are collections special counsel, where debts are forwarded "for further collection efforts." JA 124. Finally, if all else fails, the database forwards the debt to a distressed debt vendor. JA 125.

After the Third Party Vendors and before distressed debt vendors, "[t]he attorney general may appoint special counsel to represent the state in connection with all claims ... which are certified to the attorney general for collection." Ohio Rev. Code Ann. § 109.08. "Such special counsel shall be paid ... from funds collected by them in an amount approved by the attorney general." *Id.*

The Attorney General "appoint[s]" collections special counsel for one-year stints. JA 142. The "appointment" as collections special counsel "only become[s] effective upon execution of [the] Retention Agreement," JA 216, and "actions taken by special counsel are only authorized by and through the retention agreement and only for its duration," Pet. App. 23a. Even with a retention agreement in place, collections special counsel can act only on particular debts assigned to them.

2. The retention agreements emphasize that collections special counsel are separate from the Attorney General's office. "Special Counsel will render

services pursuant to this Retention Agreement as an independent contractor." JA 144. "Special Counsel ... shall not be regarded as in the employment of, or as an employee of, the Attorney General or any State Client," *id.*, and "no agency, employment, joint venture or partnership [is] created between the Parties," JA 163. Collections special counsel may "not print business cards using the Attorney General's logo." JA 144.

Likewise, collections special counsel work out of their own offices using their own equipment and staff, and are responsible for their own business expenses, including wages, insurance, and taxes. JA 144, 163-64. All work must be "conducted by employees of Special Counsel's law firm." JA 211. Ohio does not grant collections special counsel health care benefits and they do not participate in the Public Employees Retirement System. JA 121.

Consistent with the collection special counsel's status as outside contractors, the retention agreements also declare: "Special Counsel must comply with the standards of behavior set forth in ... the Fair Debt Collection Practices Act, 15 USC 1692 et seq." JA 162-63.

3. Ohio law dictates that "[t]he attorney general shall provide to the special counsel ... the official letterhead stationery of the attorney general," but only in connection with certain tax claims. Ohio Rev. Code Ann. § 109.08. "The special counsel shall use the letterhead stationery, but *only* in connection with the collection of such claims arising out of those taxes." *Id.* (emphasis added). Yet the Attorney

General "requires Special Counsel ... verbally or in writing, to use official letterhead stationery of the Ohio Attorney General for all collection activities regardless of whether they arise out of taxes," JA 119; *see* Pet. App. 24a (noting that use of Attorney General letterhead for non-tax debts is "contrary to Ohio's code").

"[T]he Attorney General's Office does not individually review and authorize each collection letter sent by Special Counsel on the official letterhead stationery of the Attorney General." JA 122.

4. Collections special counsel generally receive 33% of the first $25,000 collected on any claim or account, and are paid on a sliding scale for any amount collected above $25,000. JA 151. And unlike an "officer or employee," whom the Attorney General must "represent and defend ... in any civil action" at the State's expense, Ohio Rev. Code Ann. § 109.361, collections special counsel agree to "indemnify and hold the Attorney General and the State of Ohio harmless and immune" from all claims, including any "claims involving collection activities." JA 159. They also "shall bear all costs associated with defending the Attorney General and the State of Ohio against any such claims." *Id.*

Outside Debt Collectors Send Misleading Letters On Ohio Attorney General Letterhead

Petitioners Mark Sheriff and Eric A. Jones were appointed collections special counsel for fiscal year 2013. JA 206, 275. They entered into standard reten-

tion agreements with the Attorney General for a one-year period.

Jones sent Respondent Pamela Gillie a debt collection letter on Ohio Attorney General letterhead. Pet. App. 14a; JA 42. The letterhead bore the State of Ohio's seal and the words "Mike DeWine, Ohio Attorney General." Pet. App. 14a. The letter referred to a "medical claim" for an undisclosed creditor and stated "this is a communication from a debt collector." *Id.* (capitalization omitted). It directed Ms. Gillie to "call Denise Hall at Eric A. Jones, L.L.C. ... to make arrangements to pay this debt." The letter was signed by "Eric A. Jones, Outside Counsel for the Attorney General's Office." *Id.* (capitalization omitted).

Sarah Sheriff, an employee of Mark Sheriff's law firm, sent Respondent Hazel Meadows a similar collection letter, also on Ohio Attorney General letterhead. Pet. App. 17a. The letterhead bore the State of Ohio's seal and the words "Office of the Ohio Attorney General, Collections Enforcement Section." *Id.* The letter stated "[w]e are debt collectors" and "[p]er your request, this is a letter with the current balance owed for your University of Akron loan that has been placed with the Ohio Attorney General." *Id.* The letter was signed, "Sarah Sheriff, Wiles, Boyle, Burkholder & Bringardner Co., LPA, ... Special Counsel to the Attorney General for the State of Ohio." *Id.* Ms. Sheriff was not, in fact, a collections special counsel. JA 46.

The letters intimidated both recipients and confused them—both as to the letters' provenance and

legal ramifications. Meadows attested that the letter "scared me because I thought that the Ohio Attorney General might charge me with a crime for not paying what he said I owed." JA 139. Gillie could not tell whether the letter was a scam, but if not she was "concerned that if ... I did not pay the money, the Attorney General might garnish my wages." JA 137. The Attorney General stipulated that consumers "frequently call Attorney General staff" in confusion upon receiving letters like these. JA 129.

The Proceedings Below

1. Gillie and Meadows brought a putative class action against the lawyers who sent these letters and their law firms. The complaint alleged that collections special counsel's use of Ohio Attorney General letterhead violated 15 U.S.C. § 1692e. JA 48, 51. The Ohio Attorney General intervened. The district court stayed discovery and any proceedings regarding class certification pending a decision on "two legal issues": (1) whether collections special counsel are debt collectors under the FDCPA; and (2) whether their use of Attorney General letterhead violates the FDCPA. Pet. App. 27a.

The district court granted summary judgment for the collections special counsel and their law firms on both issues. The court held that collections special counsel are not "debt collectors" and are instead state "officers" exempt from FDCPA coverage under § 1692a(6)(C). Pet. App. 84a-90a. The court ruled in the alternative that collections special counsel's use of the letterhead was not misleading under § 1692e. Pet. App. 90a-98a.

2. The Sixth Circuit reversed and remanded. The court held that collections special counsel are not "officers" of the State of Ohio. Invoking the definition of "officer" in the Dictionary Act, 1 U.S.C. § 1, the court held that collections special counsel are not "authorized by law" to perform any duties; instead, they are "authorized only by contract with the OAG." Pet. App. 33a. Likewise, there is no "legislatively designated" Office of the Special Counsel, and collections special counsel have no "authority to exercise sovereign powers." Pet. App. 35a-36a.

Turning to the second question presented, the court noted that § 1692e(9) & (14) were at a minimum "violated in the technical sense—Mike DeWine is not the true name of any Defendant, ... and the official letterhead certainly implied that the letter was issued by the OAG." Pet. App. 48a. But the court ultimately concluded that whether these violations were material to the "least sophisticated consumer," Pet. App. 46a, was a "mixed question of law and fact" best left to the jury. Pet. App. 50a-51a. The court thus remanded for further proceedings on the question whether the dunning letters at issue were false and misleading. *Id.*

Judge Sutton dissented. In his view, requiring collections special counsel to comply with the FDCPA, which Ohio affirmatively requires by contract, would improperly intrude upon state operations. Pet. App. 55a. The court denied rehearing en banc, with Judge Sutton again dissenting, joined by four other members of the court. Pet. App 1a, 7a.

SUMMARY OF ARGUMENT

I. The FDCPA reflects Congress's decision to hold outside debt collectors—as distinguished from in-house debt collectors—to uniform minimum standards of conduct. Had Congress intended a wholesale exemption for state-owned debt, it would have exempted state-owned debt from the definition of "debt" under § 1692a(5) or "any person collecting debt owned by a State" from the definition of "debt collector" under § 1692a(6). It did not.

Collections special counsel are not "officers" of the State of Ohio. Petitioners agree that in enacting the FDCPA, Congress embraced the historical understanding of the term "officer," which is set out in this Court's precedents and common law. Under that understanding, an officer is one who holds an office that is: (a) created by law, with duties prescribed by law, not by contract; and (b) permanent and continuing. Collections special counsel fail each required element.

Here, collections special counsel's duties are prescribed not by law, but by detailed retention agreements. Without a signed retention agreement, collections special counsel can perform no duties and exercise no power. Moreover, Petitioners concede that there is no "office of [the] special counsel" in Ohio, Pet. Br. 33, and collections special counsel perform no permanent duties that are entrusted to the office. Instead, collections special counsel are retained for one-year contracts that are "personal in nature," JA 171.

The same result obtains under the Dictionary Act, which defines an officer as "any person authorized by law to perform the duties of the office." 1 U.S.C. § 1. That is just a pithy way of capturing the two key qualifications of an "officer" prescribed by this Court's precedents and common law.

Petitioners' various arguments for nevertheless treating collections special counsel as officers are meritless. First, this Court has never suggested that merely performing a sovereign function is sufficient to qualify as an officer. Second, as numerous courts have held, debt collectors and lawyers who pursue debts do not perform sovereign functions. They do not make, enforce, or interpret any law. Instead, they simply help the Ohio Attorney General collect state-owned debts. Indeed, the personnel Petitioners correctly maintain are officers confirm the two essential criteria: Their positions and duties are prescribed by law, and their offices are continuing and permanent, not personal.

Petitioners' resort to the clear-statement rule fails. The rule applies only where federal legislation threatens a radical readjustment of the federal-state balance. Here, the FDCPA imposes no such radical readjustment. It merely prohibits outside debt collectors from using unscrupulous methods when collecting consumer debts—regardless of who their client happens to be. If the Act's restrictions were a significant intrusion on state sovereignty, the Attorney General would not require collections special counsel to comply with the FDCPA by contract. And Petitioners' invitation to depart from existing principles is especially inapt where, as here, they extol the

FDCPA for "show[ing] a healthy respect for federalism." Pet. Br. 14.

II. The dunning letters that Sheriff and Jones sent to Respondents violate the plain terms of § 1692e(9) & (14). They falsely convey the "impression" that they were "issued by" the Attorney General, § 1692e(9), and they "use ... an[] ... organization name other than the true name of the debt collector's business," § 1692e(14). Sheriff and Jones are simply not the "Ohio Attorney General" and do not work at the "Office of the Ohio Attorney General."

That alone is sufficient to prove "a violation" of § 1692e(9) & (14). Contrary to Petitioners' contention, the FDCPA does not require additional proof that violations of § 1692e(1)-(16) are materially misleading to give rise to liability. Reflecting Congress's determination to bar certain deceptive practices outright, the statutory text makes plain that each enumerated act "is a violation" of the Act. Under those terms, a debt collector who engages in such conduct has violated the statute—period. A violation does not require proof of some additional, unrecited element.

In any event, the letters are materially misleading, or at least a jury could so find. As the Attorney General conceded below, they create a "sense of urgency" and encourage consumers to "prefer" state debts over others. Understandably so—if there is one thing an ordinary consumer knows about the Attorney General, it is that he is the chief law enforcement officer for the State. When he sends a letter

referencing an outstanding debt, a consumer could easily worry that failure to promptly pay will result in criminal sanctions or other severe penalties. Conceding this is false, Petitioners argue that preferring state debts is still rational because the State can garnish lottery winnings or state tax refunds. But few consumers are lottery winners and few expect imminent state tax refunds. And there may be all sorts of reasons not to prefer the University of Akron debt over your rent or car payments: The University of Akron cannot evict you or repossess your car.

Finally, any inquiry into whether the letters are misleading should be from the perspective of the "least sophisticated consumer." As the majority of circuits have recognized, that standard—rooted in nearly a century of consumer-protection jurisprudence—vindicates Congress's purpose of shielding even gullible consumers from deceptive debt collection practices.

ARGUMENT

I. Outside Debt Collectors Are Not Exempt From All The FDCPA's Prohibitions Whenever Their Client Happens To Be A Public Entity.

When Congress passed the FDCPA, debt collectors hired to collect other businesses' debts were a brutish and unscrupulous lot. They testified under oath to threatening targets with jail and impersonating police officers. *The Debt Collection Practices Act: Hearing Before the Subcomm. on Consumer Affairs of the H. Comm. on Banking,*

Currency and Housing, 94th Cong. (1976), at 31-33. They lured targets out of their homes with lies like, "Your son has been in an automobile accident and both his legs have been cut off." *Id.* at 34. They reveled in "beating" debtors by calling "every 5 minutes throughout the entire work day." *Id.* at 31.

Congress responded by prohibiting debt collectors from "us[ing] any false, deceptive, or misleading representation," § 1692e, or from "engag[ing] in any conduct ... to harass, oppress, or abuse any person in connection with the collection of a debt," § 1692d. It prohibited, for example, "[t]he use or threat ... of violence," § 1692d(1), "[t]he use of obscene or profane language," § 1692d(2), and "engaging any person in telephone conversation repeatedly or continuously with intent to ... harass," § 1692d(5).

The basic thrust of Petitioners' argument is that "Congress did not intend for the FDCPA to regulate the collection of a debt owed to a State." Jones Br. 10-11, *see* Pet. Br. 25. Petitioners argue that Congress hid that intention in a clause that excludes "officers or employees ... of a State" from the definition of "debt collector." § 1692a(6)(C). If they are right, when a debt collector collects debts for any governmental entity, he is free to threaten, berate, abuse, lie, mislead, and otherwise harass his target, knowing that the target has little recourse.

Petitioners are mistaken. The FDCPA applies to outside debt collectors, including those who collect public debts. § I.A. Collections special counsel are not "officers" of the State of Ohio. § I.B. Petitioners cannot change the Act's meaning by invoking the

clear-statement rule, because the FDCPA does not override the traditional balance of federal and state powers—and in any event its meaning is clear. § I.C.

A. The FDCPA applies to outside debt collectors, including those who collect debts for public entities.

For reasons explained above (at 4-5), the FDCPA reflects Congress's decision to hold outside debt collectors—as distinguished from in-house debt collectors—to uniform minimum standards of conduct. Congress codified the distinction in the Act's language. Its prohibitions govern all "debt collectors," defined broadly to include "any person ... who regularly collects or attempts to collect ... debts owed or due ... *another*." § 1692a(6) (emphasis added). It then exempted in-house collectors from outside collectors in two almost identical exemptions—one for private entities and one for governmental entities. The Act does not cover "any officer or employee of a creditor" collecting the creditor's debts, § 1692a(6)(A), or "any officer or employee of the United States or any State" collecting debts "in the performance of his official duties," § 1692a(6)(C). Just as an outside debt collector could not claim to be FDCPA-exempt by insisting he is an "officer" of a company (which would mean the FDCPA applies to no one), an outside debt collector cannot claim to be FDCPA-exempt by insisting he is an "officer" of a State.

If "Congress did not intend for the FDCPA to regulate the collection of a debt owed to a State," Jones Br. 10-11, it would not have expressed that in-

tention by attaching different significance to the word "officer" in these two neighboring provisions. It would have exempted state-owned debt from the definition of "debt" under § 1692a(5), as it did for commercial debt and tax debt. *Id.*; *see* Pet. Br. 24. Or it would have exempted "any person collecting debt owned by a State" from the definition of "debt collector" under § 1692a(6), as it did, for example, for "any person ... serving ... legal process." § 1692a(6)(D).

There is no indication in the text of the FDCPA that Congress intended to leave consumers at the mercy of abusive outside debt collectors, depending on whether they were late on their tuition to the University of Akron or Oberlin. The debt collectors are the same. JA 231-34. The perverse incentives are the same. The consumers are the same. And the Act decrees that the minimum standards of conduct are the same too. In fact, Congress has reiterated in a separate statute that outside debt collectors who assist in the collection of debts owed to the federal government are subject to the FDCPA's proscriptions against abusive debt collection practices. 31 U.S.C. § 3718(a)(2), (b)(6). There is no reason Congress would have wanted debt collectors to be more abusive when collecting debts for state or local governments than when collecting debts for the federal government. This is especially true given that the same outside debt collector could be collecting a debt owed to a private business one minute and turn to collecting a debt owed to a public enterprise the next.

B. Collections special counsel are not "officers" of the State of Ohio.

Since a central point of the FDCPA is to distinguish a creditor's in-house personnel from outside debt collectors, it makes perfect sense that Congress would exempt "*officers* or employees" of a company and "*officers* or employees" of a "State." Just as it would be silly to exempt the employees of a private clinic, but not its president, when they pursue patient debts, it would make no sense to exempt the Attorney General's employees, but not the Attorney General, himself.

Ignoring all context, Petitioners insist that every collections special counsel is an "officer ... of [the] State ... collect[ing] a[] debt in the performance of his official duties." Pet. Br. 18-38. The word "officer" cannot bear the weight Petitioners thrust on it. This Court's case law and common law would never have defined collections special counsel as officers. § I.B.1. The Dictionary Act embraces the same legal backdrop. § I.B.2. Petitioners' arguments for nevertheless treating collections special counsel as officers are meritless. § I.B.3.

1. Collections special counsel are not officers under this Court's precedents and common law.

Petitioners agree that Congress is presumed to have embraced the historical understanding of "officer" as set out in this Court's precedents and common law. Pet. Br. 22; *see United States v. Wells*, 519 U.S. 482 (1997). That historical definition is the one

this Court pronounced in *Metcalf & Eddy v. Mitchell* and has repeated multiple times in cases revolving around the meaning of "officer" (or "office") in federal statutes: one who occupies "a public station, permanent in character, created by law, whose incidents and duties were prescribed by law." 269 U.S. 514, 520 (1926). Packed into this definition are two basic attributes of an "officer": (a) the office must be "created by law" with "duties ... prescribed by law," not contract; and (b) the office must be "permanent" and continuing. And this Court has also observed that taking an oath of office is relevant. Collections special counsel fail each element.

Position created by law. This Court has explained what it means for an office to be "created by law, whose incidents and duties were prescribed by law." *Metcalf*, 269 U.S. at 520. In *Metcalf*, this Court held that two engineers who advised States on water supply and sewage disposal systems were not officers for purposes of the War Revenue Act of 1917 (holding "officers and employees" of "any state" exempt from federal income taxes). 269 U.S. at 519. The reason was that "[t]heir duties were prescribed by their contracts," and not by law. *Id.* at 520. This Court stressed that the term "office" "embraces the idea of ... duties fixed by law. Where an office is created, the law usually fixes its incidents, including its terms, its duties and its compensation." *Id.* Because there "was no office of sewage or water supply expert or sanitary engineer" with duties prescribed by law, the engineers were not officers. *Id.* By contrast, where Congress established the "duties" of a "special trial judge," it created an office. *Freytag v. Comm'r*, 501 U.S. 868, 881-82 (1991).

Time and again, this Court has found that a person is not an officer on the basis of this element—with a particular focus on whether a legislature or a contract defined the position's duties. *See Burnap v. United States*, 252 U.S. 512, 517 (1920) ("landscape architect" for public grounds not an officer where "no statute ... create[d] an office of landscape architect" or "define[d] the duties of the position."); *Hall v. Wisconsin*, 103 U.S. 5, 7-9 (1880) (where the state legislature appointed a commissioner and directed the governor to make a written contract "stipulating and setting forth the nature and extent of the services to be rendered," the commissioner was not an officer because, among other things, the duties were established by contract, not by law).

This distinction between statutory and contractual duties was a central feature of the common law backdrop against which this Court decided those cases. Take, for example, Mechem, the treatise Petitioners cite more than any other. Their reliance on Mechem is curious, for he emphatically supports our position and rejects Petitioners' Mechem observed that "the fact that the powers in question are created and conferred by law, is an important criterion" in distinguishing between an "office" and other positions. Floyd R. Mechem, *The Law of Public Offices and Officers* § 5, at 5 (1890). Prescribed by law means that "an office finds its source and its limitations in some act of governmental power," and not "contract." Frank J. Goodnow, *The Principles of the Administrative Law of the United States* 223 (1905). "A government office is different from a government contract. The latter from its nature is necessarily limited in its duration and specific in its objects."

United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1867).

Collections special counsel do not hold offices established by law. Petitioners concede, as they must, that there is no "office of [the] special counsel" in Ohio. Pet. App. 35a; Pet. Br. 33. Moreover, collections special counsel's duties and powers are not prescribed by law. As the court of appeals observed, the only statute that refers to collections special counsel "primarily governs the conduct of the Attorney General, and not that of special counsel." Pet. App. 31a. It provides that "[t]he attorney general may appoint special counsel to represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect." Ohio Rev. Code Ann. § 109.08. The statute therefore permits the Attorney General to appoint special counsel to assist with debt collection as needed—just as it authorizes the Attorney General to "appoint such employees as are necessary." *Id.* § 109.05. The statute is similar to the statutes in *Hall* and *Burnap*, which authorized appointments but did not give rise to offices or officers because they prescribed no particular duties.

It is the retention agreement, not the statute, which sets out collections special counsel's duties and powers. For example, "Special Counsel shall conduct any and all legal work assigned by the Attorney General." JA 142. Without a signed "retention agreement" and a specific assignment of a claim from the Attorney General's electronic database,

collections special counsel can perform no duties and exercise no power.

The retention agreements also specifically exempt special counsel from provisions of Ohio law governing officers and employees. The Ohio Code requires the State to indemnify and defend its officers and employees from lawsuits. *See* Ohio Rev. Code Ann. § 9.87 (indemnification); *id.* § 109.361 (representation). But the retention agreements provide that these provisions do not apply to special counsel, *see* JA 144, and they require special counsel to indemnify the State, JA 159.[2]

Permanent and continuing. This Court's cases have also never wavered from the position that an office must have duties that are "permanent in character," *Metcalf*, 269 U.S. at 520, and that "continue, though the person be changed," *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747); *see United States v. Germaine*, 99 U.S. 508, 511-12 (1878); *Hartwell*, 73 U.S. at 393; Mechem, *supra*, § 8, at 6-7 Where "duties are not continuing and permanent, [but] occasional and intermittent," there is no office and the subject is not an officer. *Germaine*, 99 U.S. at 512.

Permanent duties are duties that are entrusted to the office, as opposed to duties that a person con-

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[2] That collections special counsel must comply with Ohio public records law, Pet. Br. 37-38, does not make them officers. It shows only that the Attorney General cannot circumvent public records laws by outsourcing consumer debt collection to private debt collectors.

tracts to perform personally, "as needed." This Court's decisions in *Germaine* and *Auffmordt* illustrate. In *Germaine*, the Commissioner of Pensions "appoint[ed]" a physician to determine, as needed, whether persons were eligible for certain public benefits. This Court held that the physician was not an officer because the position was neither permanent nor continuing: "The surgeon [was] only to act when called on by the Commissioner of Pensions .... He may make fifty of these examinations in a year, or none." *Germaine*, 99 U.S. at 512. In *Auffmordt*, this Court applied *Germaine* and held that an expert appraiser engaged to value goods for customs duties was not an officer because he "ha[d] no claim or right to be designated, or to act except as he may be designated." *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890).

Collections special counsel hold positions that are neither continuing nor permanent. Like the physician in *Germaine* and the appraiser in *Auffmordt*, special counsel are "only to act when called on by the" Attorney General's Office to collect a debt. *Germaine*, 99 U.S. at 512. Even after signing a retention agreement, collections special counsel have "no claim or right to" to any work assignment of any kind, *Auffmordt*, 137 U.S. at 327 The Attorney General may "increase ... the number of Claims assignments made" for collections special counsel who "substantially increase the collection of their assigned Claims," and may decrease the number of assignments for collections special counsel who are not successful. JA 145. "Absent a contract *and* work being specifically assigned thereunder, 'special counsel' is an empty title." Pet. App. 33a.

Collections special counsel also hold no continuing position. Each agreement provides that it "shall terminate on" a specified date, and after the termination date "[n]o services rendered by Special Counsel ... shall be authorized." JA 142. When the contract terminates, the special counsel does not leave a vacant office for another person to fill. Instead, "[b]oth Parties [agree] that the appointment of Special Counsel is personal in nature," JA 171, and the Attorney General retains as many collections special counsel as he believes he will require in any given year. He retained 86 in 2012, and 69 the next year. JA 128.

No oath. A person who "took no oath of office" is probably not an officer. *Metcalf*, 269 U.S. at 519-20. The U.S. Constitution requires that officers take an oath of office. "[A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." U.S. Const. art. VI, cl. 3. So does Ohio law. Ohio Rev. Code Ann. § 3.22. Thus, "to be an officer, the person should have sworn an oath and possess a commission." *DOT v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1235 (2015) (Alito, J., concurring). That requirement "may seem mundane on its face" but there "is good reason to think that those who have not sworn an oath cannot exercise significant authority." *Id.* at 1234-35.

Collections special counsel take no oath of office, further confirming that they are not officers.

2. The Dictionary Act does not change the historical meaning.

Petitioners place considerable weight on the Dictionary Act's definition of "officer." Of course, that definition cannot change the meaning where "the context indicates otherwise." 1 U.S.C. § 1. So nothing in that statute can overcome the context discussed above (at 17-18) distinguishing in-house personnel from outside debt collectors. In any event, as Petitioners concede, the Dictionary Act merely codified the "historical[] ... meaning" of the term "officer," Pet. Br. 22, and is thus entirely consistent with this Court's two essential attributes. Indeed, *Metcalf* applied the same familiar attributes to determine officer status to federal statutes enacted *after* Congress passed the Dictionary Act.

The Dictionary Act defines an "officer" as "any person authorized by law to perform the duties of the office." 1 U.S.C. § 1. That is just a pithy way of capturing the two key qualifications of an "officer" prescribed by this Court's precedents and common law. By describing an officer as someone who is "authorized by law to perform the duties of *the* office," the definition captures the basic criterion that the person holds an office that is created by law with duties prescribed by law and not contract. And by referring to "*the* office," the definition embraces the criterion that an officer performs duties that are permanent and continuing and not personal.

Thus, collections special counsel fail the Dictionary Act definition for the same reason that they fail the historical definition. *See* Pet. App. 31a-36a.

3. Petitioners' arguments are meritless.

Petitioners' various arguments for nevertheless treating collections special counsel as officers defy both precedent and the plain meaning of the Dictionary Act.

a. To start, Petitioners announce a rule for qualifying as an "officer" that this Court has never embraced.

Petitioners assert that collections special counsel are officers as long as Ohio law "empower[s] the position, nothing more." Pet. Br. 31. By that logic, every employee in the Attorney General's Office is an "officer," because Ohio law empowers its Attorney General to "appoint" all staff. Ohio Rev. Code Ann. §§ 109.05, 109.08.[3] This argument ignores the settled precept that the duties of the office must be prescribed by law, not by contract. As Chief Justice Marshall explained, an Act "empowering the president, generally, to cause fortifications to be constructed" could not establish an office of "agent of fortifications" that the President could create and fill by appointment. *Maurice*, 26 F. Cas. at 1214. Instead, for the agent to be an officer, a statute or reg-

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[3] It is thus of no moment that the Ohio legislature authorized the Attorney General to "appoint" collections special counsel. Ohio Rev. Code Ann. § 109.08. A bare authority to "appoint" does not create an office or an officer. *See Hall*, 103 U.S. at 9-10. Just because all Ohio employees are "appointed," *see, e.g.*, Ohio Rev. Code Ann. § 124.01(F) (defining "employee" as "any person holding a position subject to appointment"). does not mean that a janitor is a state "officer."

ulation had to provide "for the appointment, and define the duties." *Id.* Only because a regulation subsequently adopted by Congress did just this, did Chief Justice Marshall hold the agent an officer. *Id.* at 1215.

In similar vein, Petitioners argue that a person is an officer as long as he performs a "sovereign function[]." Pet. Br. 28-29. This Court's decisions have never said that. And while some treatises state that performing a sovereign function is a necessary criterion in order to be an officer, none state it is sufficient.

Regardless, collections special counsel do not perform sovereign functions. As Mechem himself explains, "sovereign functions of government" are "either legislative, executive or judicial" and "[u]nless the powers conferred are of this nature, the individual is not a public officer." Mechem, *supra,* § 4, at 5; *see* Pet. App. 35a-36a (quoting Black's Law Dictionary for the proposition that "sovereign power" is "[t]he power to make and enforce laws"). Collections special counsel do not wield any of these sovereign powers. Like any consumer debt collector, they do not make any laws. They also do not execute or interpret any laws. And in sending demand letters and filing complaints for "account stated" to recover debts owed to the University of Akron, they do not enforce any laws of the State of Ohio. *E.g.*, Complaint, *Ohio State Univ. v. Braun,* No. 13-CV-9467 (Ohio Ct. Com. Pl. Aug. 26, 2013) *available at* http://tinyurl.com/zcah6pt.

Petitioners are unclear on what the sovereign power is that collections special counsel supposedly wield. Their cert. petition indicated that consumer "debt collection qualifies as a central sovereign activity," Pet. 17. But for support, they cited only cases noting that state debts were once entitled to priority over regular debts at common law, and were not discharged in bankruptcy. Pet. 17; Pet. Br. 1-3. As the court of appeals aptly observed, "[t]he authority to collect consumer debts is not a sovereign power; instead, it is a right that can be exercised by any creditor." Pet. App. 35a. Now, Petitioners switch gears, arguing that collections special counsel wield two completely new sovereign powers: They "represent the sovereign in court," Pet. Br. 14, and receive public moneys, Pet. Br. 29.

As to the first, this case does not involve representing the sovereign in court. It involves letters to debtors who have not been—and may never be—sued. And even if representing the sovereign in court were a sovereign power, the Ohio legislature has endowed only the Ohio Attorney General, not collections special counsel, with that authority. Ohio Rev. Code Ann. §§ 109.02; 131.02(C). Collections special counsel may neither "initiat[e] litigation on behalf of the State" nor enter into any "final settlements" without "the prior approval of the Attorney General," JA 149; must consult "as soon as possible" with the Attorney General's office regarding any "controversial, high profile, or otherwise noteworthy" matter, including all appeals, JA 146; and "shall consult with and obtain the approval of the [Attorney General's office] before responding to any public records request," JA 147 Given these

constraints, special counsel do not exercise sovereign power just because the Attorney General authorizes them to file a suit for account stated—any more than a contractor exercises sovereign power when the Transportation Department authorizes him to build a federal highway.

On this very basis, courts long ago established that even attorneys who assist States in the collection of tax debts are not officers because they do not *themselves* exercise any sovereign authority.[4] And numerous courts likewise have held that non-attorneys who assist in the collection of public debts are not officers because they exercise no sovereign authority.[5]

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[4] *See State Tax Comm'n v. Harrington*, 94 A. 537, 539 (Md. 1915) (general counsel to the tax commission not an officer because, among other reasons, "the incumbent exercises no sovereign power, but only such power as is derived from and through the State Tax Commission"); *State ex rel. Gibson v. Fernandez*, 58 P.2d 1197, 1200 (N.M. 1936) (special tax attorney not an officer because "all sovereign power affecting the collection of delinquent taxes is conferred on the commission," not the collector).

[5] *See Cochran v. Comm'r*, 135 F.2d 45, 47 (5th Cir. 1943) (land agent appointed by governor to sell real estate for taxes who took an oath of office is not an officer or employee because he "was serving under a contract"); *Jefferson County v. Case*, 12 So. 2d 343, 345-46 (Ala. 1943) (deputy tax collector who "dispersed money received and collected" not an officer where "duties are undefined by the statutes"); *Green v. Stewart*, 516 S.W.2d 133 (Tex. 1974) (deputy tax collector not officer because deputies "act[ed] in the right of the tax assessor-collector rather than in their own right").

Petitioners do not advance their argument by noting that the U.S. Attorney General is an officer who exercises sovereign power. Pet. Br. 25. That is because he is the sovereign's *chief law enforcement official* who is statutorily assigned responsibility for "the direction of" nearly all "litigation in which the United States, an agency, or officer thereof is a party." 28 U.S.C. § 516. That does not mean that every lawyer who represents a public entity—in-house or outside—is exercising sovereign power, and it certainly does not mean that a lawyer representing the State in a claim for "account stated" is an officer.[6]

As for receiving public moneys, Petitioners are wrong in asserting that all "persons ... through whose hands money due to the public ... passes on [the] way to the public treasury" are officers of the State. Pet. Br. 29 (citation and quotation marks omitted). Money due to the public passes through the hands of every IRS mailroom clerk, post office teller, and FedEx driver. That does not make them all officers performing sovereign functions.

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[6] *See Norcross v. Helvering*, 75 F.2d 679, 680 (D.C. Cir. 1935) (attorney litigating state claims against federal government not an officer because attorney's duties were established only by contract); *Buckner v. Comm'r*, 77 F.2d 297, 299 (2d Cir. 1935) (special assistant attorney general not an officer because "he was a 'private citizen' engaged in the general practice of his profession in the course of which he entered into a contract with the state"); *Comm'r v. Emerson*, 98 F.2d 650, 651 (3d Cir. 1938) (township attorney not officer because he was an independent contractor); *Haight v. Comm'r*, 52 F.2d 779, 781 (7th Cir. 1931) (same); *Childers v. Comm'r*, 80 F.2d 27, 31 (9th Cir. 1935) (same).

b. Petitioners offer several illustrations to support their proposed line, but they all confirm that this Court's two essential criteria govern.

On one side of the ledger are the personnel Petitioners correctly maintain *are* officers. For example, no doubt, the United States Attorney General is, and has always been, an officer of the United States. That is true even though he "maintain[ed] an active private law practice until 1853." Pet. Br. 25 (quotation marks and citation omitted). Same for Commissioners of the Federal Election Commission. Pet. Br. 29. And same for United States "[d]istrict attorneys (now U.S. Attorneys)." They were officers even though they were long-ago employed "on a fee-for-services basis" when enforcing the revenue laws. Pet. Br. 29.

Why? Because they all satisfied the two criteria: (1) Congress defined their positions and prescribed their duties; and (2) they held offices with ongoing duties to enforce and interpret the laws of the United States that continued beyond the tenure of any one individual. For example, Congress provided that a district attorney "shall be appointed in each district ... to act as attorney for the United States in such district." *Revised Statutes of the United States Passed at the First Session of the Forty-Third Congress*, 1873-74, § 767 (2d ed. 1878). Congress entrusted the district attorney with the duty "to prosecute ... all delinquents for crimes and offenses ... and all civil actions in which the United States are concerned." *Id.* § 771. And the district attorneys held their posts for a term of four years, *id.* at § 766, during which time they were the ones primarily re-

sponsible for representing the United States in their districts.[7]

On the other side of the ledger are personnel who are not officers. Petitioners cite Mechem for the proposition that at common law a deputy sheriff was an officer, even though the statute did not define certain attributes of the office. Pet. Br. 20-21 (citing Mechem, § 379, at 250). But Mechem explained that a deputy sheriff was *not* an officer *unless* "such appointment is provided for by law ... which fixes the powers and duties of such deputies." Mechem § 38, at 16. "[W]here the deputy is appointed merely at the will and pleasure of his principal to serve some purpose of the latter, he is not a public officer but a mere servant or agent." *Id.*

c. Petitioners ignore the cases that are most on point—cases like *Metcalf* and *Germaine*, in which this Court has construed the term "officer" in federal statutes. Instead, they pull stray quotes mainly from state court cases. But those cases only confirm the centrality of the two key criteria that this Court has invoked.

In the one Supreme Court case, this Court specifically acknowledged that "[a] government office is different from a government contract." *Hartwell*, 73 U.S. at 393 (cited at Pet. Br. 27, 31). And it held

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[7] *Accord Buckley v. Valeo*, 424 U.S. 1, 110-11 (1976) (recognizing FEC Commissioners were empowered to issue binding interpretations of federal election laws and "institute" litigation to enforce the statute without the "concurrence of or participation by the Attorney General").

the clerk an officer in part because his "duties were continuing and permanent, not occasional or temporary." *Id.*

Petitioners' state court cases are similar. *Commonwealth v. Evans* held that an attorney collecting claims for the State was an officer, but only where he "had official duties under [a] joint resolution, as his bond acknowledged," and he was not performing a "service rendered to the Commonwealth under a contract." 74 Pa. 124, 140 (1874). *Patton v. Board of Health* held that health commissioners were officers because "the legislature ... created the office and has fixed the salary attaching to it," and the "duties [were] not prescribed by contract, but [were] defined by the government through the board of health." 59 P 702, 706 (Cal. 1899) (cited at Pet. Br. 31); *accord State ex rel Clyatt v. Hocker*, 22 So. 721, 723 (Fla. 1897) (cited at Pet. Br. 21). In *Solowitch v. Bennett*, the "duties of the deputy registrar [were] also prescribed by statute." 456 N.E.2d 562, 565-66 (Ohio Ct. App. 1982) (cited at Jones Br. 15). And *Territory v. Wills* invoked Chief Justice Marshall's admonition that an office "is defined by rules prescribed by the government, and not by contract." 25 Haw. 747, 751-52 (1921) (quoting *Maurice*, 26 F. Cas. at 1214) (cited at Pet. Br. 31).

The only other precedent from this Court on which Petitioners meaningfully rely is *Filarksy*. But *Filarsky* was not about the meaning of the word "officer" in any statute, which is problematic because (as Petitioners emphasize) "this case involves the meaning of 'officer' in a federal statute." Pet. Br. 36.

Filarsky was about the scope of the judge-made doctrines of absolute and qualified immunity. While this Court observed that "the common law did not draw a distinction between public servants and private individuals engaged in public service in according [immunity] protection to those carrying out government responsibilities," *Filarsky v. Delia*, 132 S. Ct. 1657, 1663 (2012), it did not hold that all those granted immunity at common law were also "officers." To the contrary, the prevailing law held that, while members of the "posse comitatus" "had the same authority as the sheriff, and w[ere] protected to the same extent" when executing a warrant in terms of immunity from suit, *id.* at 1664 (citation omitted), they were "not themselves officers" of the State, *Robinson v. State*, 18 S.E. 1018, 1019 (Ga. 1893). Granting a non-officer immunity does not turn him into an officer—and this Court never said it does.

C. The clear-statement rule does not apply and would be satisfied anyway.

Petitioners and Jones maintain that any ambiguity must be resolved in their favor because the FDCPA "touches a sensitive area ... that raises sovereignty concerns." Pet. Br. 25; *see* Jones Br. 23-24. Even if they were right, it would not matter because Congress spoke clearly. The Act's language, structure, and purpose all point inexorably to the conclusion that Congress wanted to distinguish between in-house debt collectors and outside debt collectors—not to license outside debt collectors to lie, abuse, and threaten consumers whenever their client is a public entity.

In any event, Petitioners are wrong; the clear-statement rule does not apply here. The clear-statement rule is as follows: "[I]t is incumbent upon the federal courts to be certain of Congress's intent before finding that *federal law overrides the usual constitutional balance of federal and state powers.*" *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (emphasis added)). This Court has applied this principle only where federal legislation threatens a "radical[] readjust[ment]," "significant change," or "dramatic[] intru[sion]" with respect to the federal-state balance. *Bond*, 134 S. Ct. at 2088-89 (citations omitted).

The FDCPA does not "override" any constitutional balance—much less "radically" or "dramatically" so. The FDCPA does not prevent States from collecting debts. It does not constrain state-employed debt collectors in any way—even from using misleading or abusive tactics. It does not prevent States from hiring outside debt collectors to help it collect debts. It merely prohibits outside debt collectors from using unscrupulous and thuggish methods when collecting one category of debts—debts consumers incur when they buy goods and services. Petitioners' complaint is that the court of appeals did not carve out an exception for when an outside debt collector's client is a public entity. Petitioners do not point to any tradition of States using unscrupulous and thuggish methods when collecting debts from consumers—much less hiring outside debt collectors to do so. If the Act's restrictions were such a significant intrusion on state sovereignty, the Attorney General would not draft retention agreements with

debt collectors insisting that they comply with the FDCPA. JA 162-63.

Notably, Petitioners do not argue that the FDCPA represents a "radical" change or even a significant incursion on state sovereignty. They argue only that the Act "touches a sensitive area." Pet. Br. 25. That is not the test. This Court has applied the clear-statement rule only in situations representing serious intrusions upon state sovereignty. *Gregory*, for example, concerned whether Congress intended a federal law to invalidate "a state constitutional provision through which the people of Missouri establish[ed] a qualification for those who sit as their judges"—"a decision of the most fundamental sort for a sovereign entity." 501 U.S. at 460. In *Bond*, the question was whether Congress intended a law implementing an international chemical weapons treaty to federalize a wide swath of local criminal activity that had previously been punishable only by the State. 134 S. Ct. at 2087-88. At issue in *BFP v. Resolution Trust Corp.* was whether "[t]he title of every piece of realty purchased at foreclosure would be under a federally created cloud." 511 U.S. 531, 544 (1994). Likewise, in *Nixon*, the State would have lost its traditional right to limit its political subdivisions from entering into contracts, *Nixon v. Missouri Municipal League*, 541 U.S. 125, 140 (2004), and in *Ours Garage*, Ohio would have lost its traditional right to delegate to its subdivisions at all, *Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 437-40 (2002).

Petitioners' test would itself be a radical shift in this Court's jurisprudence. This Court has encoun-

tered many federal laws that "touch" upon matters of state sovereignty. And it routinely interprets those laws without applying any clear-statement rule. Take, for example, laws that subjected an independent contractor to federal taxation while exempting an "officer or employee of a state." *See Metcalf*, 269 U.S. at 526. Such a law obviously "touches" upon "the structure of government" because it makes employees cheaper hires than contractors. But in that context, this Court simply interpreted the text that Congress enacted. Indeed, it held (without applying any clear-statement precept) that a special counsel hired to collect state taxes did not qualify for the exemption from federal income taxes as an "officer or employee" of a State. *Lucas v. Reed*, 281 U.S. 699 (1930) (per curiam). This Court also applied no clear-statement rule when it held that the antitrust laws applied to market participants to whom a State had delegated regulatory control over a market. *North Carolina Board of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1111-14 (2015).

If "touch[ing]" on matters of state sovereignty were enough to trigger the clear-statement rule, then the doctrine would automatically carve States and state contractors out of just about any generally applicable federal law unless the law explicitly provided otherwise. States would be exempt from laws that impose emissions controls on cars (including police cars) and restrict the services of banks (including banks that hold state funds), and state contractors would be immune from laws that impose safety standards on the worksites they run (including public works projects).

As these examples (and so many more) illustrate, there is no principled way to figure out when federal legislation touches on "a sensitive area" or a "sovereign function." Petitioners' approach would require this Court to conduct the very case-by-case "judicial appraisal of whether a particular governmental function is 'integral'" that this Court abandoned as "unworkable" in *Garcia v. San Antonio Transit. Auth.*, 469 U.S. 528, 546-47 (1985).

Petitioners' invitation to depart from existing principles is especially inapt where, as here, they extol the FDCPA for "show[ing] a healthy respect for federalism." Pet. Br. 14. The FDCPA excludes state employees from its definition of "debt collector", expressly cabins the scope of any displacement of state law; and allows States to seek to exempt categories of debt collection practices from the FDCPA entirely. §§ 1692a(6), 1692n, 1692o. This is not a statute that rides roughshod over state sovereignty.

II. The Collections Special Counsel's Letters Violate The FDCPA.

On the legality of the dunning letters at issue here, Petitioners ask the wrong question—and then answer it incorrectly. The question is not whether this Court believes the dunning letters are misleading. The question is not whether a consumer (average, unsophisticated, or least sophisticated) would find them materially misleading. The question is simply whether the dunning letters fit within either of two enumerated violations that *Congress* defined as per se "violation[s] of this section": Do the letters falsely convey the "impression" that they

were "issued by" the Attorney General, § 1692e(9), or do the senders "use ... any ... organization name other than the true name of the debt collector's business," § 1692e(14)?

The dunning letters violate the Act in both respects for the simple reason that Sarah Sheriff and Eric Jones are not the "Ohio Attorney General" and do not work at the "Office of the Ohio Attorney General." § II.A. Petitioners are wrong in insisting that this Court is entitled to second-guess Congress's definition of a violation by grafting onto the statute a materiality requirement that Congress did not prescribe. § II.B. But the letters are materially misleading, in any event, under any standard: A consumer reacts differently to a letter she receives from the chief law enforcement officer of the State than she reacts to a letter from a professional debt collector—or at least a jury could so find. § II.C. While this Court need not reach the question, the court of appeals correctly viewed the letters from the perspective of the least sophisticated consumer. § II.D.

A. Collections special counsel's use of Attorney General letterhead violates two enumerated provisions of § 1692e.

1. The letters violate § 1692e(9) by leaving the false "impression" that they were "issued by" the Attorney General.

Section 1692e(9) provides that "the following *is a violation*" of the Act:

> The use or distribution of any written communication which *simulates* or is falsely represented to be *a document* authorized, *issued*, or approved by any court, official, or agency of the United States or *any State*, or which creates a *false impression* as to its *source*, authorization, or approval.

§ 1692e(9) (emphasis added). The dunning letters that Sheriff and Jones sent to their targets violate the plain terms of this provision for two distinct reasons: (1) each "simulates ... a document ... *issued* ... *by*" the Attorney General; and (2) each "creates a false impression as to its *source*." The asserted violation revolves around those two words—"issued" and "source."

When you put a letter on letterhead that blares, "Office of the Ohio Attorney General" in large type, you communicate that the letter was "issued by" that office—that the "source" is someone in that office. After all, letterhead is typically understood to "indicat[e] the source of origin of the document." *Alexander v. CareSource*, 576 F.3d 551, 561 (6th Cir. 2009).

That is a "false impression." These letters were not "issued by" the Attorney General or his office; they were "issued by" collections special counsel. As Petitioners concede, collections special counsel are independent contractors and not employees of the Attorney General. Pet. Br. i, 7 Collections special counsel work out of their own offices, using their own staff and equipment, at their own expense. JA 163-64. They are not even allowed to put the Attorney

General's logo on their business cards. JA 173. In short, collections special counsel are not the Attorney General, nor are they part of his office. That is why courts have consistently found violations where debt collectors have done what Jones and Sheriff did here, because a private person's use of government letterhead is inherently misleading.[8]

Petitioners do not deny that each letter "simulates ... a document ... *issued* ... by" the Attorney General or that each "creates a false impression as to its *source*." Instead of focusing on the plain language that makes out the violation—the two words "issued" and "source"—Petitioners offer two arguments in mitigation, arguing essentially that one can imagine more serious cases of simulation or source confusion.

Petitioners' main theme is that the letterhead "accurately conveys" that collections special counsel act "for" or "on behalf of" the Attorney General when they send their dunning letters. *E.g.*, Pet. Br. i, 13, 17, 46, 47; *see* Jones Br. 37-38. That would be a fine defense if the statute forbade nothing but written

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[8] *See, e.g., Del Campo v. Am. Corrective Counseling Serv., Inc.*, 718 F. Supp. 2d 1116, 1134 (N.D. Cal. 2010) (letters on district attorney letterhead violated § 1692e(9) because they did not "disclose the identity of the actual sender," an outside debt collection agency); *Schwarm v. Craighead*, 552 F. Supp. 2d 1056, 1076 (E.D. Cal. 2008) (inclusion of district attorney's name and title in debt collection company's letterhead falsely represented letters were from a district attorney's office); *Gradisher v. Check Enf't Unit, Inc.*, 210 F. Supp. 2d 907, 914 (W.D. Mich. 2002) (use of Sheriff Department letterhead falsely suggested that collection letters came from there, rather than an independent contractor).

communications that "falsely convey on whose behalf" they were written. But it is no defense to violating a statute that prohibits also false impressions as to who "issued" or was the "source of" the letter. The problem with the Attorney General's letterhead is that it falsely conveys the impression that his office "issued" the letter, not just that someone else wrote it "on his behalf."

There is a difference. If a law firm intends to send a letter for or on behalf of a client, it uses its own letterhead and indicates in the body of the letter on whose behalf it is writing. If instead a law firm sends a letter on its client's letterhead, it indicates that the letter was issued by the client, not simply for the client or on the client's behalf.

That is why Petitioners miss the mark in noting how important it is for special collections counsel "in all ... correspondence" to "indicate that such document is prepared by the Special Counsel in its position as Special Counsel for the Attorney General." Pet. Br. 47. They do not need to use Attorney General letterhead to convey that. All they need to do is what any lawyer does in any letter he writes on behalf of a client: Open with, "We write as Special Counsel for the Attorney General."

Petitioners' other argument is that the letters do not "falsely represent[] that special counsel's letters are *authorized* by the office." Pet. Br. 46 (emphasis added). That defense would be relevant (though ul-

timately wrong[9]) if we were asserting a different violation—that the letters are "falsely represented to be a document *authorized* ... by" the Attorney General. But Congress rendered the violations in § 1692e(9) in the disjunctive ("authorized, *issued*, *or* approved by" the Attorney General/"false impression as to its *source*, authorization *or* approval"). Petitioners cannot excuse the violation they did commit by pointing to violations they did not commit.

The Attorney General conceded the point at oral argument below. He acknowledged that an outside debt collector violates the Act if she uses IBM's letterhead to collect a debt owed to IBM, even though she is acting on IBM's behalf and with IBM's full authorization. JA 413-14, 419-20.[10] Nothing in the statute distinguishes IBM from the University of Akron.[11]

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[9] The reason the defense would fail is that a debt collector violates § 1692e(9) unless the specific "written communication ... is ... a document authorized ... or approved by" the Attorney General. Here, collections special counsel independently "draft, print, compile, and distribute each collection letter they use." JA 122. The Office of the Attorney General does not review, "authorize[]" or "approve[]" individual letters. *See id.*; *Avila v. Rubin*, 84 F.3d 222, 228 (7th Cir. 1996) (use of attorney letterhead violated § 1692e(9) because he was "not personally or directly involved in deciding when or to whom a dunning letter should be sent"); *Clomon v. Jackson*, 988 F.2d 1314, 1317, 1321 (2d Cir. 1993) (same).

[10] The conversation there happened to be about § 1692e(14), but the point is the same for both.

[11] In what may be a third variation on the same theme, Petitioners contend that the letters are effectively "issued by" the Attorney General because collections special counsel act as

2. The letters violate § 1692e(14) by using a name other than collections special counsel's "true name."

The violation of § 1692e(14) is even simpler. That paragraph provides that "the following conduct *is a violation*" of the Act:

> The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

§ 1692e(14) (emphasis added). The dunning letters here match the plain terms of this prohibition because "Office of the Ohio Attorney General" is not the "true name of the debt collector's business."

The Attorney General has conceded the violation by stipulating that "[e]ach Special Counsel has a true business name, company name or organization name *which is different than* the Attorney General's Office." JA 122 (emphasis added); *see* JA 131 ("Special Counsel use both the official letterhead stationery of the Attorney General's Office *as well as their*

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the Attorney General's "agents" when they send the letters out. Pet. Br. 50. But the retention agreements declare that collections special counsel are not the Attorney General's agents. JA 163. Even if they were, that would not mean that letters they send on behalf of the Attorney General are "issued by" him or his office under § 1692e(9); it simply means they are issued on his behalf. Same with any letter sent by a lawyer on behalf of a client. Acting on a client's behalf does not turn the lawyer into the client himself.

own names and their own law office names in their letters to debtors.").

Petitioners make essentially the same arguments against this straightforward conclusion as they make against ¶ 9—and they are wrong for essentially the same reasons. They assert that "Special counsel *do* act for the Attorney General's Office and so the office's name is not a pseudonym." Pet. Br. 48; *see* Jones Br. 32. But the fact that collections special counsel collect debts under contract with the Attorney General does not entitle them to represent that they *are* the Attorney General or part of his office. Congress enacted this provision because it wanted to prohibit exactly this sort of blurring: outside debt collectors who operate a "business the principal purpose of which is the collection of any debt[]" trying to pass themselves off as the actual creditor to whom the debt is owed. § 1692a(6).

Here, again, the Attorney General's IBM concession discussed above (at 44) settles the matter. But here it is even starker, because any other conclusion would gut the provision wholesale. Violations of § 1692e(14) "typically involve a debt collector ... purporting to be the creditor when it is not." *Mahan v. Retrieval-Masters Credit Bureau, Inc.*, 777 F. Supp. 2d 1293, 1300 (S.D. Ala. 2011); *see Peter v. GC Servs. L.P.*, 310 F.3d 344 (5th Cir. 2002) (private debt collector hired by the U.S. Department of Education could not lawfully identify the Department as the return addressee on the collection letter envelope); *Carrizosa v. Stassinos*, No. C-05-02280 RMW, 2010 WL 4393900, at *2 (N.D. Cal. Oct. 29, 2010) (granting summary judgment

against debt collector for violating § 1692e(14) by sending letters in the creditor's name rather than its own name); *Hartman v. Meridian Fin. Servs., Inc.*, 191 F. Supp. 2d 1031, 1046 (W.D. Wis. 2002) (same).

Petitioners and Jones worry that faithful application of ¶ 14 would "require[] them to hide" "special counsel's connection to the office." Pet. Br. 53; *see* Jones Br. 36. That is absurd. Section 1692e(14) prohibits a debt collector from using another organization's name as its own. It does not prohibit a debt collector from *referring to* its client or accurately describing its relationship to the client. The FDCPA expressly contemplates that the "initial communication with a consumer in connection with the collection of any debt" may contain "the name of the creditor to whom the debt is owed." § 1692g(a)(2). Thus, as earlier noted (at 43), collections special counsel are free to disclose the relationship in the text of the dunning letter.

B. Petitioners cannot change the result by inserting a materiality element.

Petitioners and Jones maintain that it does not matter whether the letters violate the plain terms of ¶¶ 9 and 14 because any violation that has been proven is not materially misleading. Pet. Br. 43-44; *see* Jones Br. 37 This argument fails for two reasons. First, Congress did not prescribe any such requirement for the enumerated violations listed in § 1692e(1)-(16), including the two at issue here. Second, as we demonstrate in the next section, any such element is satisfied regardless. § II.C.

The statutory text is the starting place for "discern[ing] whether [a statute] require[s] a showing of materiality." *Neder v. United States*, 527 U.S. 1, 20 (1999). The FDCPA enumerates 30 specific prohibitions distributed among three categories. Each category begins with a catch-all prohibition, followed by a series of enumerated violations.

The provision at hand begins:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

§ 1692e. The section then lists 16 acts, each of which "*is* a violation" of the Act. Similarly, the immediately preceding section begins:

> A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

§ 1692d. The section then lists six items, each of which "*is* a violation" of the Act, such as the "publication of a list of consumers who allegedly refuse to pay debts." § 1692d(3); *see also* § 1692f (same structure—a catch-all prohibiting "unfair or

unconscionable" means to collect a debt, followed by eight enumerated "violation[s]").

When Congress repeatedly says "the following conduct *is a violation* of this section," it means that a debt collector who engages in that conduct is violating the statute. It does not mean that the violation requires proof of some additional, unrecited element. Thus, when a plaintiff proves that a debt collector published a list of purported deadbeats in the local paper, he has proven a violation of § 1692d(3). The debt collector cannot defend by arguing, "There is nothing abusive about publishing such a list," or "this particular list was not abusive, because these deadbeats deserved it." Congress made the judgment, and a court has no latitude to second-guess it.

So, too, for § 1692e. Once we demonstrate that the dunning letters match one or more of the prohibitions enumerated in that section, the debt collectors cannot defend by arguing, "There is nothing misleading about this particular act of misrepresenting the source of the letter or using a name other than the true name of our business." And they certainly cannot defend by saying, "This letter may have been misleading, but the violation should be excused because the misimpression should not affect the recipient's behavior." Congress made the judgment, and this Court has no latitude to second-guess it. Congress wanted to stop certain debt collection practices cold, not foster courtroom debate over whether those practices might be tolerable under some circumstances. *See Frey v. Gangwish*, 970 F.2d 1516, 1521 (6th Cir. 1992) (to remedy a "widespread problem," Congress "crafted a broad statute").

Ignoring the clear language establishing per se violations, Petitioners insist that this Court should borrow a materiality element underlying traditional definitions of terms like "misleading" and "deceptive" and engraft it onto the FDCPA. Pet. Br. 39, 43-44. But the sentence introducing the enumerated violations does not use those terms. *See* 15 U.S.C. § 1692e ("[T]he following conduct is a violation of this section ...."). Only the previous sentence does—the catch-all. Petitioners would have no argument if Congress had not included the catch-all or if it had put it at the end (e.g., "Any other practice that misleads ..."). And they do not explain how the catch-all provision up front could possibly limit the categorical provisions that follow. If, as Congress declared, the categorical provisions do not "limit[] the general application of the foregoing," then the "general" pronouncement certainly should not limit the categorical prohibitions.

In any event, even as to the catch-all provision, Congress plainly was not following the common law in designing the statutory scheme. At common law, a tort plaintiff would have to establish reliance, injury, and usually intent or even willfulness to recover for a false misrepresentation. *See* Restatement (Second) of Torts § 537 (1977) ("The recipient of a fraudulent misrepresentation can recover against its maker for pecuniary loss resulting from it if ... he relies on the misrepresentation in acting or refraining from action ...."); Black's Law Dictionary 724 (4th ed. 1968) (defining "false representation" as "[a] representation which is untrue, *willfully* made to deceive another *to his injury*" (emphasis added)). But Congress eliminated all those elements from the FDCPA, *see, e.g.*,

§ 1692k(a) (declaring that "any debt collector who fails to comply with any provision of this [subchapter] with respect to any person is liable" and imposing $1000 in statutory damages irrespective of any harm suffered), in favor of a strict liability standard, *see Wahl v. Midland Credit Mgmt., Inc.*, 556 F.3d 643, 646 (7th Cir. 2009). Thus, "the FDCPA permits and encourages parties who have suffered no loss to bring civil actions for statutory violations." *Jacobson v. Healthcare Fin. Servs., Inc.*, 516 F.3d 85, 96 (2d Cir. 2008). There is no reason to believe that Congress tacitly imported common law materiality into a statute that eliminated just about every other common law element.

C. The letters are materially misleading.

Even if courts are free to second-guess Congress's judgment—and subject each enumerated violation to a separate materiality test—the dunning letters are materially misleading. Or at least a reasonable jury could so find. On this last point, Petitioners seem to forget that the court of appeals did not decide the materiality question as a matter of law; it held only that a reasonable juror could find the letters materially misleading. Since that is the procedural posture (and Petitioners did not seek cert. on whether that was appropriate), Petitioners cannot prevail on this issue unless they prove that no reasonable juror could find the letters materially misleading.[12] By their own definition, that would re-

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[12] Though the Court of Appeals stated that this is a question of fact to be decided by the jury, Pet. App. 50a-51a, we agree with the majority of circuits that whether particular

quire them to prove that no reasonable juror could find that the challenged practice is "capable of leading consumers astray in their action or conduct." Pet. Br. 43 (alterations and quotation marks omitted).

Far from proving this, Petitioners have conceded the point away. Why do they want collections special counsel to use Attorney General letterhead? They say it creates a "sense of urgency," JA 415-16, "to get the debtor to prefer the debt with the state over and above his other debts." JA 416-17; *see* JA 334. In other words, the Attorney General's name at the top communicates a message—and stirs an "action or conduct"—in a way that a letter on special counsel stationery does not.

Petitioners have not volunteered what exactly it is about Attorney General letterhead that motivates in this way. Any number of possibilities come to mind when one views this letter from the perspective of an everyday consumer—your barber, grocery store clerk, or mechanic. For starters, there could be a fear of criminal prosecution. If there is one thing an ordinary consumer knows about the Attorney General, it is that he is the chief law enforcement officer for the State, responsible for enforcing the State's criminal laws. *See* Prosecution, Ohio Attorney General, http://tinyurl.com/z6rljus (last visited Feb. 18, 2016). The Ohio Attorney General actively publicizes his role in criminal law enforcement. *See* News Releases,

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conduct violates the FDCPA is a question of law. *See Wilson v. Quadramed Corp.*, 225 F.3d 350, 353 n.2 (3d Cir. 2000). Because no party has asked this Court to address that question, it need not do so.

Media, Ohio Attorney General, http://tinyurl.com/hyuopso (last visited Feb. 18, 2016). What the typical consumer (or even a sopnisticated one) almost certainly will *not* know is that the Attorney General is also in the collections business. *See* Pet. App. 49a. Accordingly, when the Attorney General sends a letter referencing an outstanding debt, a consumer could easily worry that failure to promptly pay will result in criminal penalties or other severe consequences. Both Respondents in this case attested that the letters they received from collections special counsel triggered precisely such concerns. JA 137, 139.

Other consumers might be incentivized to pay debts they would otherwise contest because they believe that the Attorney General has reviewed the files and verified that the debt is due and owing. At least so far as appears from the record, that is false—no one in the Attorney General's Office substantively examines the validity and amount of a debt before the electronic database forwards it to collections special counsel. *See* JA 123-26; *Avila*, 84 F.3d at 229 (a letter from an attorney "implies that the attorney has reached a considered, professional judgment that the debtor is delinquent and is a candidate for legal action").

Still other consumers might simply trust the Attorney General and his staff more than a private debt collector who takes a third of the debt as commission, and therefore defer to the letterhead more than they ought to.

Regardless of the mental mechanism, the impression that Petitioners admit to intentionally fostering—that a state debt should be "prefer[ed]" over "other debts," JA 416-17—is false, or at least not uniformly true. There is ordinarily no greater urgency to pay a state debt than any other debt—and there may be all sorts of reasons not to. The state-run clinic cannot evict you or repossess your car. The University of Akron cannot cancel your health insurance or kick your kid out of daycare. The letterhead, therefore, certainly can "lead[] consumers astray in their action or conduct." Pet. Br. 43 (alteration and quotation marks omitted).

The only rationale Petitioners offer to justify the misimpression is that the Attorney General has "special authority" regarding debt collection that outside collectors do not. Pet. Br. at 53-54. But all they point to is the fact that a State can take the debt out of lottery winnings or state tax refunds. Needless to say, few consumers (and even fewer debtors) are lottery winners. And many debtors do not expect tax refunds—especially not imminently. Similarly, the fact that the statute of limitations may not run against the State, Pet. Br. 53, is irrelevant, at best—and it might actually be a reason to prioritize the debts of other creditors, who are under greater pressure to sue soon.

This is enough to satisfy any materiality requirement—and certainly enough to go to a jury. One of Congress's core concerns in passing the FDCPA was to protect consumers against misleading impressions about the legal status of a debt or the consequences of failure promptly to pay. *See*

§ 1692e(2)(A), (4), (5). "Section 1692e was enacted against a backdrop of cases in which courts held that communications designed to create a false sense of urgency were deceptive." *Peter*, 310 F.3d at 352.

Petitioners suggest that the letterhead is not materially misleading because the signature lines report that the signatories are "Outside Counsel" or "Special Counsel for the Attorney General." Pet. Br. 47. While the term "Outside" may mean something to a lawyer, it is foreign to the average consumer. And even the most sophisticated consumer is unlikely to know what "Special Counsel" is. Certainly, a reasonable juror could conclude that the signature line does not overcome the message blaring on the top.

In any event, Petitioners' own proposed standard makes these sorts of disputes—about what consumers perceive—largely irrelevant. The most we need to establish is that the communication "*could* affect a debtor's decisionmaking." Pet. Br. 43 (emphasis added); *see id.* at 44 (a materiality requirement prevents liability for a "technical falsehood"); *Elyazidi v. SunTrust Bank*, 780 F.3d 227, 234 (4th Cir. 2015) ("To violate the statute, a representation ... could objectively affect [a] consumer's decisionmaking." (citation omitted)). This requirement accords with the materiality threshold this Court has recognized in analogous contexts, asking only whether the practice has "a natural tendency to influence, or be capable of influencing," the decision in question. *United States v. Gaudin*, 515 U.S. 506, 509 (1995) (alterations and citation omitted).

Finally, Petitioners prove nothing by observing that insurance agents routinely "use Nationwide's letterhead when selling Nationwide insurance." Pet. Br. 50-51. There is no law against that practice, presumably because (misleading or not) Congress did not think it could lead consumers to act against their own interests when buying insurance. But the FDCPA categorically prohibits analogous conduct in debt collection, because Congress believed that debt collectors *do* mislead consumers into taking action they might not otherwise take when collectors use a principal's letterhead—which, again, is exactly why Petitioners have adopted the practice. Certainly a reasonable juror could so find. Pet. App. 54a.

D. The court of appeals correctly adopted the "least sophisticated consumer" standard.

Petitioners' cert. petition posited two alternative perspectives from which to view deceptive conduct: the "unsophisticated consumer" versus the "least sophisticated consumer." Pet. 24-28. They did the same before the court of appeals. Dkt. 59 (en banc petition). Now, for the first time, Petitioners propose a standard that no circuit has ever applied under the FDCPA, insisting that the proper perspective is that of the "average consumer." Pet. Br. 40-43.

This Court need not address this argument, for several reasons. First, it is waived. S. Ct. R. 24.1(a); *Austin v. United States*, 509 U.S. 602, 622-23 (1993) ("Prudence dictates that [this Court] allow the lower courts to consider [a new] question in the first instance."). Second, as indicated above (§ II.B.), Con-

gress has already made the determination that conduct described in the enumerated paragraphs is materially misleading. Third, especially in light of the Attorney General's concession as to his objective, these letters are materially misleading from any perspective. *Supra* § II.C. But should this Court wish to resolve the issue, it should embrace the standard the court of appeals applied.

Initially, it bears noting that there is little daylight among the various standards on the table. The circuits have observed that there is no "practical difference in application" between the two standards they apply—the unsophisticated and least sophisticated consumer. *Avila*, 84 F.3d at 227; *accord Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98, 103 n.4 (1st Cir. 2014). Regardless of how it is phrased, all courts agree that "the standard is low, close to the bottom of the sophistication meter." *Avila*, 84 F.3d at 226. Petitioners' "average consumer" standard sounds higher at first blush. But Petitioners immediately qualify it by conceding that "[t]he standpoint is ... that of the average consumer in the lowest quartile (or some other substantial bottom fraction) of consumer competence." Pet. Br. 41-42 (quoting *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 774 (7th Cir. 2007)).

Regardless, this Court should follow the "overwhelming majority" of circuits and apply the least sophisticated consumer standard. *Jensen v. Pressler & Pressler*, 791 F.3d 413, 419 n.3 (3d Cir. 2015). Because consumers of "below-average sophistication" are "especially vulnerable to fraudulent [debt collection] schemes," *Clomon v. Jackson*, 988 F.2d at

1314, 1319 (2d Cir. 1993), they are "the particular objects of the statute's solicitude," *Bartlett v. Heibl*, 128 F.3d 497, 500 (7th Cir. 1997). Only this standard achieves Congress's goal of shielding "the gullible as well as the shrewd" from deceptive debt collection practices. *Clomon*, 988 F.2d at 1318.

Petitioners object that "[a] representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative ... class of persons to whom the representation is addressed." Pet. Br. 43 (citation omitted). But the least sophisticated consumer test does not ask what the single "least intelligent consumer in this nation of 300 million people" would believe. *Evory*, 505 F.3d at 774. It does not indulge "bizarre or idiosyncratic interpretations of collection notices." *Clomon*, 988 F.2d at 1319-20. It asks merely what consumers of "below-average sophistication" would believe, *id.* at 1319, which appears to be what Petitioners advocate.

Contrary to Petitioners' assertions, Pet. Br. 42, the least sophisticated consumer standard also has an impressive historical pedigree. The first circuits to adopt the standard drew on decades of jurisprudence under the Federal Trade Commission Act. *See Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1172-75 (11th Cir. 1985); *Baker v. G. C. Servs. Corp.*, 677 F.2d 775, 778 (9th Cir. 1982). As this Court explained almost 80 years ago, that statute's prohibition against deceptive business practices was intended "to protect the trusting as well as the suspicious." *FTC v. Standard Educ. Soc.*, 302 U.S. 112, 116 (1937). The fact that a false statement "may be

obviously false to those who are trained and experienced does not ... take away its power to deceive others less experienced." *Id.*; *see Florence Mfg. Co. v. J.C. Dowd & Co.*, 178 F. 73, 75 (2d Cir. 1910) (law governing trademarks was made for the protection of "the public—that vast multitude which includes the ignorant, the unthinking and the credulous").

Accordingly, to assess the "tendency of language to deceive," courts and the FTC have historically looked "not to the most sophisticated readers but rather to the least." *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 872 (2d Cir. 1961). This approach accords with this Court's statements regarding deceptive business practices in general: When "the public lacks sophistication" in a particular area, misstatements that might otherwise be acceptable "may be found quite inappropriate." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977).

Against this backdrop, it would be "anomalous" to infer that Congress intended to apply a more restrictive standard to FDCPA violations. *Jeter*, 760 F.2d at 1173-74. Congress enacted the FDCPA precisely because existing consumer protection legislation was inadequate to combat deceptive debt collection practices. *Id.*; *see* 1977 U.S.C.C.A.N. at 1696-97 (finding that existing state and federal laws were inadequate to protect consumers); H.R. Rep. No. 95-131 at 3-4 (same). Thus, Congress inserted several innovations into the Act, including a private right of action for consumers, § 1692k, and a civil liability standard that does not turn on the violator's intent, § 1692k(a). It makes little sense to suppose that Congress would have diluted the enhanced

protections it sought to provide to vulnerable consumers by expecting them to exhibit greater sophistication to see through deception.

CONCLUSION

The Court should hold that collections special counsel are debt collectors under the FDCPA and that the letters Respondents received violate § 1692e(9) & (14).

Respectfully submitted,

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The Code of Laws of the United States of America

Title 1- General Provisions

This title was enacted by act July 30, 1947, ch. 388, § 1, 61 Stat. 633

§ 1. Words denoting number, gender, and so forth

In determining the meaning of any Act of Congress, unless the context indicates otherwise—

...

"officer" includes any person authorized by law to perform the duties of the office;

§ 1692d. Harassment or abuse

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.

(2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.

(3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 1681a(f) or 1681b(3)[1] of this title.

(4) The advertisement for sale of any debt to coerce payment of the debt.

(5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

(6) Except as provided in section 1692b of this title, the placement of telephone calls without meaningful disclosure of the caller's identity.

(Pub. L. 90-321, title VIII, § 806, as added Pub. L. 95-109, Sept. 20, 1977, 91 Stat. 877.)

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[1] See References in Text note below.

REFERENCES IN TEXT

Section 1681b(3) of this title, referred to in par. (3), was redesignated section 1681b(a)(3) of this title by Pub. L. 104-208, div. A, title II, § 2403(a)(1), Sept. 30, 1996, 110 Stat. 3009-430.

TITLE 15 – COMMERCE AND TRADE

§ 1692f. Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principle obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any non-judicial action to effect dispossession or disablement of property if—

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

(Pub. L. 90-321, title VIII, § 808, as added Pub. L. 95-109, Sept. 20, 1977, 91 Stat. 879.)

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In the Supreme Court of the United States

MARK J. SHERIFF; SARAH SHERIFF; WILES, BOYLE, BURKHOLDER & BRINGARDNER CO., LPA; and MICHAEL DEWINE; Attorney General of Ohio,

Petitioners,

–v–

PAMELA GILLIE and HAZEL MEADOWS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF ON THE MERITS OF RESPONDENTS ERIC JONES AND THE LAW OFFICE OF ERIC A. JONES, LLC IN SUPPORT OF PETITIONERS

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REPLY BRIEF ON THE MERITS OF RESPONDENTS ERIC JONES AND THE LAW OFFICE OF ERIC A. JONES, LLC IN SUPPORT OF PETITIONERS

I. SPECIAL COUNSEL SHOULD BE ABLE TO ACT UPON HIS/HER APPOINTMENT AS AN OFFICER OF THE STATE WITHOUT FEAR OF LIABILITY

Special counsel are officers appointed by the Ohio Attorney General ("OAG") in accordance with state law. *See* R.C. § 109.08. State law outlines their duty "to represent the state in connection with all claims which are certified to the attorney general for collection." *See Id.* It also outlines that they "shall be paid for their services from funds collected by them " *See Id.* After appointment, each special counsel enters into a contract, which further details the nature of the relationship. Notably, special counsel are required by the OAG to use his letterhead in the course of their official work. *See* J.A.421. That is "because the state would like people to know when communications are coming from the state." *See Id.* Special counsel are also considered part of the "unclassified civil service" alongside any Assistant Attorneys General. *See* R.C. § 124.11(A)(11). Special counsel are trained by the OAG's staff and required to attend "in-house seminars." *See* J.A.331. More generally, special counsel can "perform all manner of special functions made possible only by the special statutory authority that they are granted under [R.C. §] 124.11. .[T]hese are not powers that could be granted under any contract. They can prosecute crimes. They can defend in the Court of Claims. They

can prosecute fraud under Workers Compensation and Medicaid and Civil Service laws [T]hey have special authority to collect under [R.C.§] 109.08." *See* J.A.332-33; *see also* R.C. §§ 109.07, 109.81, 109.83, 109.84. Finally, the practice of the OAG using special counsel is not new by any stretch.[1] *Compare* 97 Ohio Laws at 60, *with* 114 Ohio Laws at 53.

Special counsel are not simply "outside debt collectors" for the State of Ohio, nor are they treated that way. The retention agreement refers to their "appointment" and does not exclude them as officers, but only as employees.[2] *See* J.A.141-169. Given the understanding that they are officers and representatives of the State, special counsel take direction from the OAG, including the use of his letterhead when sending letters to state debtors. *See*

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[1] It should be noted that the United States Solicitor General has filed an amicus curiae brief with counsel for the Consumer Financial Protection Bureau (the "CFPB") in support of Plaintiffs' in this case. Richard Cordray, who now serves as the director of the CFPB, previously served as the Ohio Attorney General from 2009-2011, when Special Counsel were used to protect the state's bottom line. *See* Ohio Attorney General Annual Report, p.12, retrieved from http://goo.gl/ZTLGYq

[2] Plaintiffs claim that the OAG and special counsel have changed their position and their contract states that special counsel are not officers. This is incorrect. Plaintiffs are under the misunderstanding that special counsel's status as an independent contractor precludes him/her from also being an officer of the state. 15 U.S.C. 1692a(6) exempts both "employees" and "officers" recognizing that an officer may not be an employee. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (there is a "duty to give effect, if possible, to every clause and word of a statute.")

J.A.333. It is clear that special counsel are officers of the State of Ohio and should be able to rely on their appointments without fear of liability. Here, Jones clearly identified his and his law firm's role—he used his law office's return address on the envelope, signed his name to the letter, and referred to himself, truthfully, as "outside counsel" to the OAG. The only reference to the OAG was in the letterhead, which the OAG required Jones to use.

II. A State Government Is Free to Exercise Domain Over Sovereign Rights of the State

Plaintiffs provide this Court with a number of false dilemmas. The first is that the application of the FDCPA's "officer" exemption here would necessarily include all outside debt collectors for public entities. Supposedly, a reversal would allow anyone to be an "officer," making the FDCPA enforceable upon no one. *See* Resp.Br.17 That argument misses the point. The application of the "officer" exemption here merely draws on the Dictionary Act definition of the term "officer." Another false dilemma is that the position of the Jones Respondents supposedly requires that "Congress intended to leave consumers at the mercy of abusive outside debt collectors", and Congress would not have desired more abuse. *See* Resp.Br.18. But that expansive view of the FDCPA has the potential to extinguish all exemptions and limits on the statute because Congress could always theoretically "do more" to curb supposed abuses. The Plaintiffs also rely upon *United States v. Wells*, 519 U.S. 482 (1997) for the proposition that "Congress is presumed to have embraced the historical understanding of "officer" as set out in this Court's

precedents and common law." *See* Resp.Br.19. Unfortunately, *Wells* only states that this is true where "the statute [does not] otherwise dictat[e]." *See Wells* at 491. Here, the Dictionary Act does "otherwise dictate." In addition, the Plaintiffs rely upon numerous cases that focus on the definition of the term "officer" in the Constitution as well as cases that were decided well after the Dictionary Act was passed and simply do not incorporate any historical meaning of the term "officer."

A. The Dictionary Act Provides the Correct Definition for the Term "Officer"

The Dictionary Act was passed in 1871 with the definition of the term "officer" being the same as it is today, broadly including "any person authorized by law to perform the duties of the office." *See* 1 U.S.C. § 1. As the Dictionary Act provides definitions to statutory terms that are left undefined in federal statutes, specifically here the FDCPA, "it must be consulted" by the Court "unless context indicates otherwise." *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2768 (2014). The context of the FDCPA does not indicate that Congress had any intent to defin[illegible] the term "officer."[3] Instead of looking to the Dictionary Act, Plaintiffs attempt to re-cast the historical definition of the term "officer" by looking at non-analogous cases as well as those decided long after the 1871 passage of the Dictionary Act. There is simply no way that these cases help define the historical meaning of the term "officer" as it is

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[3] Congress knows how to supersede the Dictionary Act and has done so before. *See* 5 U.S.C. § 2104; 10 U.S.C. § 101(b)(1).

encompassed in the Dictionary Act. Finally, Plaintiffs rely upon cases that focus only on the more narrow Constitutional definition of the term "officer." These attempts only succeed in proving the natural divide that this Court has drawn between cases where an officer was established by law to a position that involved sovereign duties, and cases lacking one or both of these qualities.

Plaintiffs first point to *Metcalf & Eddy v. Mitchell*, a case where engineers were "professionally employed" to advise States about "proposed water supply and sewage disposal systems. *See Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 518 (1926). This Court correctly found that these engineers were not "officers" under the War Act as their work did not involve any sovereign duties. *See Id. Metcalf* also found that the engineers were not appointed by government to any office, their duties, business, and compensation were not provided for in a statute and their work was not continuous. *See Metcalf* at 520. Some engineers worked as long as specific assignments may last while others worked from year to year. *See Id.* Lastly, the relationship between the engineers and the State was entirely prescribed by contract (where the Court could not find reference to any statutory authority). *See Id.* Notably, the engineers in *Metcalf* were not in a position established by law nor were they handling any sovereign duties of the state and thus, were not officers according to the Dictionary Act definition.

The *Metcalf* opinion then specifically dives into the very divide contemplated here, listing a myriad of cases where the "government immediately and

directly exercises its sovereign powers." *See Metcalf, supra* at 522. Noticeably, each case where this Court found the existence of sovereign powers includes either the power to administer and enforce laws or the handling of public funds. *See Metcalf* at 522; *see also Weston v. City Council of Charleston*, 29 U.S. 449, 467 (1829) (state obligations sold to raise public funds); *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 585-86 (1895) (state obligations sold to raise public funds); *United States v. Railroad Co.*, 84 U.S. 322 (1872) (investment of public funds); *Ambrosini v. United States*, 187 U.S. 1 (1902) (bonds required for exercise of police power).

Plaintiffs then cite to numerous cases, all of which support the same divide. The party in *Maurice* was not properly appointed to an office that was established by law. *See United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823)(No. 15,747). In *U.S. v. Germaine,* the surgeon was properly appointed by law to examine pension applicants but this was clearly not a sovereign function. *See United States v. Germaine*, 99 U.S. 508 (1878). In *Hall v. Wisconsin*, this Court found that the parties were not officers where there was a state statute requiring the governor to "make a written contract" with geologists to conduct surveys but the statute did not outline the position at all. *See Hall v. Wisconsin*, 103 U.S. 5, 8-9 (1880). This conclusion makes sense as the governor was not authorized to appoint anyone, and the position involved no sovereign duties. *See Id.* Finally, in *Burnap v. United States,* this Court found that the party was not an officer where "[t]here is no statute which creates an office of landscape architect." *See Burnap v. United States*, 252 U.S. 512, 517 (1920).

Again, this case is consistent with the natural divide, where: 1) the position was not authorized by law; and 2) a landscape architect presumably had no sovereign function.

Conversely, the officer in *Hartwell* was appointed by law and was handling public funds (a sovereign duty). *See United States v. Hartwell*, 73 U.S. 385 (1867). Likewise, in *Freytag v. Comm'r*, this Court found that special judges were officers because the "office is established by law," with "duties, salary and means of appointment specified by statute." *See Freytag v. Comm'r*, 501 U.S. 868, 880 (1991). Among other things, they carry out "important functions" and "exercise significant discretion" interpreting federal law. *See Id.* Noticeably, these appointments are established by law and the officers carry out sovereign duties.

These same cases are also largely distinguishable from this case because they look to the Constitutional definition of the term "officer" instead of how it appears in the Dictionary Act. *See Metcalf, supra*[4]; *Maurice* at 1213; *Germaine* at 509; *Burnap* at 514-15; *Hartwell* at 393-94; *Freytag* at 892. While the Constitution uses the term "officer," the definition is remarkably narrow and does not encompass the meaning from the Dictionary Act. If the meaning of the term "officer" is derived solely

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[4] *Metcalf* involved a tax statute where Court at the time would not allow the taxing of state officers and this Constitutional commandment, which has since been overruled, had been codified by Congress. *See Metcalf, supra.* Because of this, the *Metcalf* case is really about the definition of the term "officer" as it appears in the Constitution.

from cases that look to the Constitution, the Dictionary Act would be superfluous. But when looking at "inferior officers" under the Constitution, it becomes clear that special counsel are in fact officers.

In *Morrison v. Olson*, this Court found that independent counsel were officers where they: 1) were subject to removal by the Attorney General; 2) were "empowered by the Act to perform only certain, limited duties"; 3) did not formulate policy; 4) were required to comply "with the policies of the Department"; and 5) their office was "temporary" and for a single task. *See Morrison v. Olson*, 108 S.Ct. 2597, 2608-09 (1988). Independent counsel sounds virtually identical to special counsel except that special counsel does not have a "temporary," single task, instead being appointed for yearly terms. To be clear, Ohio has provided the OAG with statutory authority to appoint (and inherently also to remove) special counsel, which he does in yearly terms. Special counsel do not formulate policy but are required to abide by the standards set for the office of the OAG.[5]

Plaintiffs continue, making much of the fact that special counsel enter into contracts with the OAG, claiming this proves the position was not "established by law." *See* Resp.Br.21. This claim upends common sense, history and the legal context

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[5] It should also be noted that the decision in *Morrison* falls along the same natural divide as the other "officer" cases. Independent counsel was 1) established by the Ethics in Government Act (*see Morrison* at 2603); and their duties were the "investigation and prosecution for certain federal crimes." *See Morrison* at 2609.

surrounding the Dictionary Act. Looking again to *Hartwell*, this Court found that the defendant was an "officer" even though his duties were "to be such as his superior in office should prescribe." *See Hartwell, supra* at 393. Likewise, a law that did not specify a deputy sheriff's pay allowed a sheriff to contract with the deputy as it relates to pay and where a law did not fix an officer's term, an at-will position was created. *See* Floyd Mechem, *A Treatise on the Law of Public Offices and Officers*, § 379, p. 250 and § 445, p. 284. The fact that contracts exist between the OAG and special counsel does not exclude special counsel from being considered officers. In fact, this argument is only pertinent in determining whether special counsel are employees of the OAG, which admittedly, they are not. *See Metcalf, supra* at 173 (discussion about characterization as employee or independent contractor). Any discussion about the independent contractor relationship is also irrelevant because it is the statutory authority (R.C. § 109.08) that creates the authority to act.

Plaintiffs argue that there is no "office of [the] special counsel" but miss the mark. *See* Resp.Br.22. This formalistic approach fails the substance of the definition of "officer", looking to the identity of an "office" instead of the duties of the person. Indeed, in *Filarsky,* this Court found that there was "no very clear conception of a professional office," where someone "devotes his entire time to the discharge of public functions." *See Filarsky v. Delia*, 132 U.S. 1657, 1662 (2012). Accordingly, there was some other measure of an "office." Mechem defines an office as "the right, authority and duty, created and conferred by law, by which for a given period, either fixed by

law or enduring at the power of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. *See* Floyd Mechem at § 1, p. 1-2. *Hartwell* is also instructive, where despite the lack of creation of an "office of the clerk," the defendant was still an officer. *See Hartwell, supra* at 392-93. This is because the duties in *Hartwell* involved handling public funds, which is traditionally considered a sovereign function.

Plaintiffs' claims also overlook other portions of special counsel's relationship with the OAG, including the fact that the OAG contractually requires special counsel to follow the FDCPA. *See* J.A.162-63. The OAG recognized that special counsel are exempt from the FDCPA and wanted to impose these standards nonetheless. Additionally, the OAG has stated that each special counsel is assigned an account representative from the OAG's office to help in the handling of accounts. *See* J.A.101. Assistant Attorneys General often work with special counsel to "draft pleadings," "join cases as co-counsel" and "cover cases for Special Counsel in special circumstances." *See* J.A.102.

B. The Clear Statement Rule is not Satisfied

Next, Plaintiffs inaccurately claim that the clear statement rule of *Gregory* is only employed "where federal legislation threatens a 'radical[ ] readjust[ment],' 'significant change,' or 'dramatic[ ] intru[sion]' with respect to the federal-state balance." *See* Resp. Br 36. But such a statement is inaccurate, because it also applies where "federal legislation threaten[s] to trench on the State's chosen disposition of its own

power." *See Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004); *see also Jackson v. Sedgwick Claims Mgmt. Servs., Inc.*, 731 F.3d 556, 567 (6th Cir. 2013) (en banc). It is this very balance that has created such "staggering diversity" in how states governs. *See Avery v. Midland Cnty.*, 390 U.S. 474, 482-83 (1968).

This case is not just about two letters, but the rights of all states to direct their appointed officers. This Court has respected the bounds of federalism in much less radical ways than Plaintiffs claim. *See Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 439 (2002) (interpreting federal law so that it allowed for the States to decide how best to divide authority between "the State's central and local units.") A state's choice to use special counsel is a structural choice akin to that in *Ours Garage, supra.* Likewise, this Court respected the way states structured their affairs as they relate to § 1983. *See Filarsky,* 132 S.Ct. at 1662-65. These cases indicate the necessity of interpreting the "officer" exemption of the FDCPA so that it does not exclude people that a state has statutorily appointed as officers.

Despite this, Plaintiffs return again to the argument that Defendants are unable "to represent that they <u>are</u> the Attorney General or part of his office." *See* Resp.Br.46. This highlights the reason for the clear statement rule. Ohio has chosen to appoint individuals as special counsel instead of merely contracting with outside companies. The clear statement rule requires that this Court interpret the FDCPA so that it does not "upset the usual constitutional balance of federal and state powers"

unless it is "unmistakably clear in the language of the statute" that this was Congress' intent. *See Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). This language here is not clear and the clear statement rule has not been satisfied.

III. THE DUNNING LETTERS, WHEN REVIEWED IN THEIR ENTIRETY, CANNOT BE MATERIALLY MISLEADING

Plaintiffs incorrectly argue that there is no materiality requirement in determining whether a party has violated § 1692e(1)-(16). Although "Congress painted with a broad brush in the FDCPA not every technically false representation by a debt collector is a violation of the FDCPA." *See Gabriele v. Am. Home Mortgage Servicing, Inc.*, 503 F. App'x 89, 94 (2d Cir. 2012); *see also Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 596 (6th Cir. 2009) (complaint mischaracterizing credit card debt as loan was not materially false or misleading under the FDCPA); *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365, 374 (4th Cir. 2012) ("courts have generally held that violations grounded in 'false representations' must rest on material misrepresentations"); *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1034 (9th Cir. 2010) (mislabeling in state complaint of interest owed on debt was not a material misrepresentation under the FDCPA); *Hahn v. Triumph P'ships LLC*, 557 F.3d 755, 758 (7th Cir. 2009) (Easterbrook, C.J.) ("a false but non-material statement is not actionable" under the FDCPA because "[a] statement cannot mislead unless it is material"). Plaintiffs are unable to navigate around the significant weight of case law reading a "materiality" requirement into the FDCPA.

A. The Dunning Letters Were Not Misleading at All, Much Less Materially Misleading

Plaintiffs continue, criticizing the Jones Respondents' position that the letter accurately conveys the relationship between special counsel and the OAG. *See* Resp.Br.42. They allege that the letterhead "falsely conveys the impression that [the OAG] 'issued' the letter, not just that someone else wrote it 'on his behalf.'" *See Id.* But the facts here do not bear out this contention, as the OAG stated that when debtors call his office regarding the dunning letters in question "[t]he debtors are assured that the debt is valid and being collected at the direction of the Attorney General." *See* J.A.101 (emphasis added).

Despite this, Plaintiffs point to several outlying cases with non-analogous facts in an attempt to bolster their claims. In *Del Campo v. Am. Corrective Counseling Serv., Inc., Schwarm v. Craighead*, and *Gradisher v. Check Enforcement, Unit, Inc.*, the letters were considered a potential violation of § 1692e because of the fact that none of the senders disclosed their identity at all. *See Del Campo v. Am. Corrective Counseling Serv., Inc.*, 718 F.Supp.2d 1116, 1134 (N.D. Cal. 2010); *Schwarm v. Craighead*, 552 F.Supp.2d 1056, 1076 (E.D.Cal 2008); *Gradisher v. Check Enforcement Unit, Inc.*, 210 F.Supp.2d 907, 914 (W.D. Mich. 2002). Additionally, Plaintiffs repeatedly conflate the idea that something is confusing with the idea that something is materially misleading.[6] *See* Resp.Br.55. Indeed, Plaintiffs state

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[6] Mislead is defined as "[t]o lead astray in action or conduct." *See* 9 Oxford English Dictionary 873.

that they were afraid they would be charged with a crime or that their wages would be garnished. *See* Resp.Br.10. But the letters do not represent anything about charging Plaintiffs with crimes or garnishing wages. Their alleged "confusion" did not come from the letters. *See* Pet.App.55a and 57a.

The letters sent to Plaintiffs were not materially misleading.[7] Plaintiffs pointed to no case law supporting their position that the letter in this case was materially misleading: The letters were true and clear.

1. There is No Violation of § 1692e(9)

After denying the materiality requirement discussed above, Plaintiffs then parse the language of 15 U.S.C. 1692e(9) to claim that the letters simulate those issued by the Attorney General, creating "a false impression as to its source." *See* Resp.Pet.41 (emphasis included). But Plaintiffs inaccurately state that the Jones letter included the words "Office of the Ohio Attorney General" when the letterhead on the Jones dunning letter actually only states "Mike DeWine Ohio Attorney General." *See Id.* Although a seemingly minor misstatement, this inaccuracy wrongly bolsters their claim regarding the source of the dunning letter. In fact, the letter does not state that it is from the "Office of the Ohio Attorney

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[7] The 6th Circuit in *Miller, supra* found that a communication should be "read in its entirety, carefully, and with some elementary level of understanding. *See Miller, supra* at 595; *see also Compuzano-Burgos v. Midland Credit Mgmt., Inc.*, 550 F.3d 294, 299 (3d. Cir. 2008). Plaintiffs cannot pick out pieces of a communication but must look to the entire communication.

General" but clearly states that it is from the "Law Office of Eric A. Jones, L.L.C." and the debtor should make payments to "Eric A. Jones, L.L.C." *See* Pet.App 14a.

Unlike in *Del Campo, Schwarm,* and *Gradisher,* special counsel are appointed by statutory authority and also have a contractual relationship with the OAG. Special counsel are unclassified civil servants, not simply outside contractors. *See* R.C. § 124.11(A)(11). Moreover, unlike the above-mentioned cases, Jones clearly identified his and his law firm's role–he used his law office's return address on the envelope, signed his name to the letter, and referred to himself, truthfully, as "outside counsel" to the OAG. The only reference to the OAG was in the letterhead, which the OAG required Jones to use. One court in the 6th Circuit recently distinguished *Gradisher* for similar reasons. *See Golem v. Palisades Acquisition XVI, LLC,* No. 1:11CV02591, 2012 WL 2995480, *3 (N.D. Ohio July 23, 2012) (rejecting claim that a law firm's use of a caption stating "Berea Municipal Court" was misleading, because the document indicated it was sent by and directed questions to the law firm). The reality is that Plaintiffs' claim regarding the "source" of this letter is not supported here, instead only being supported in cases where the actual sender of the letter does not disclose their identity at all.

Plaintiffs claim that "[t]he problem with the Attorney General's letterhead is that it falsely conveys the impression that his office "issued" the letter, not just that someone else wrote it "on his behalf." But this impression also happens to be an

accurate one, as an entity cannot act except through its representatives. Plaintiffs claim that special counsel do "not need to use Attorney General letterhead to convey that" (*See* Resp.Br.43) but that is not the choice of special counsel. That decision was made by the OAG, relying on Ohio law allowing him to appoint special counsel and require the use of his letterhead. *See* J.A.421. Because special counsel "represent the state" (*See* R.C. § 109.08) and in turn the OAG, the implication that it was written on behalf of his office is not a misleading one, much less materially so.

Finally, Plaintiffs resort to a weak analogy to IBM: an independent contractor using IBM letterhead to collect a debt owed to IBM would mislead consumers. That argument is erroneous on two counts. First, special counsel is not a debt collector under the FDCPA because of the "officer" exemption (as discussed above). Second, special counsel act on behalf of the OAG through their statutory appointment. In effect, each special counsel stands in the shoes of the OAG himself, and not merely as an agent, but as a statutorily appointed officer.

2. There is No Violation of § 1692e(14)

Plaintiffs claim that the Defendants violated § 1692e(14) of the FDCPA because the OAG is not the "true name of the debt collector's business." But this argument is completely irrelevant to the analysis of this section. The Jones Respondents are able to correctly use several "true names"—Jones' own name, that of the OAG to whom he has been appointed to serve, and that of his private business which provides him with office space. This section

simply "forbids the use of a pseudonym" that would make it difficult for a consumer to discover a debt collector's identity. *See White v. Goodman*, 200 F.3d 1016, 1018 (7th Cir. 2000). In fact, the use of multiple, true names is consistent with the FDCPA so long as that name "does not misrepresent his identity or deceive the consumer." *See* Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,107 (Dec. 13, 1988). Furthermore, Plaintiffs cannot point to any authority showing that the use of multiple, true names is inconsistent with the FDCPA.

In this context, it is logical that the letter would appear on OAG letterhead, contain Jones' individual name and position with the OAG in the signature block, and provide the name and address of the LLC where the debtor can obtain more information and send payment. This is no different than how a letter from an Assistant OAG "employee" might appear–the individual writing the letter would use OAG letterhead, list his own name and position with the OAG, and direct the debtor where to send payment. No one would argue that the Assistant OAG was not using his "true name" when he used OAG letterhead and such a claim should be rejected here as well.

In another attempt to bolster their argument, Plaintiffs again cite to several non-analogous cases. The first case is *Mahan v. Retrieval-Masters Credit Bureau, Inc.*, where a collection agency did not violate § 1692e(14) when it used a licensed trade name to collect on a debt owed by the plaintiff. *See Mahan v. Retrieval-Masters Credit Bureau, Inc.*, 777 F.Supp.2d 1293, 1300-01 (S.D. Ala. 2011). The first

obvious difference is that *Mahan* deals with a private entity collecting debt as opposed to a state attorney general and his officers. Aside from this, the court in *Mahan* also stated that "debt collectors may use alternative names they are legally entitled to use, and that are not misleading." *See Id.* at 1300 (internal quotations and citations omitted). Here, special counsel is legally entitled by statute and required by the OAG to use the OAG's name and letterhead. The use of this alternative name is not misleading, as discussed above, but instead portrays an accurate relationship between the parties.

Next, Plaintiffs cite to *Peter v. GC Servs., L.P.*, where a debt collector hired (not appointed) by the U.S. Department of Education, used the Department's address as its return address on an envelope. *See Peter v. GC Servs., Inc.*, 310 F.3d 344, 352 (5th Cir. 2002). Unlike *Peter*, Plaintiffs in this case admit in their complaint that "the envelope containing the letter had the return name and address of Law Office of Eric A. Jones., L.L.C." *See* J.A.43. Because of this fact, *Peter* wholly supports the Defendants in this case, stating:

> By convention the name and address placed in this corner is that of the return addressee, or the sender of the mail.[6] By using the department as the return addressee, GC Services represented the sender of the mail as the Department of Education, when in fact it was GC Services. Thus, GC Services used the Department of Education name as its own, violating § 1692e(14).

Peter v. GC Servs. L.P., 310 F.3d 344, 352 (5th Cir. 2002).

Finally, Plaintiffs cite to two district court cases where the defendants apparently sent out letters to the debtors in the name of their clients without identifying themselves at all. *See Carrizosa v. Staminos*, No. C-05-02280 RMW, 2010 WL 4393900, at *2 (N.D. Cal. Oct. 29, 2010) (where debt collector sent dunning letter under client's name with no identification of debt collector at all); *see also Hartman v. Meridian Fin. Servs., Inc.*, 191 F.Supp.2d 1031, 1046 (W.D. Wis. 2002) (same). Here, special counsel has truthfully provided the debtors with all of the pertinent information. First, the letter is about a debt owed to the State of Ohio. Second, the officer sending the letter (Jones) is "outside counsel for the Attorney General's Office." Third, the "Law Office of Eric A. Jones, L.L.C." is one place where the debtor can get more information about the debt. None of those "true names" and associations are false or misleading.

Plaintiffs entire case rests on the allegation that the use of the OAG letterhead convinces a debtor to prefer the state debt over private debt and creates a "sense of urgency." *See* Resp.Br.52. If that is true, why would it be illegal to say it? The involvement of the state and the OAG is what stirs any sense of urgency. The unique remedies available to the state (tax refund impact, etc.), make state debts different from private debts. There has been no violation of the FDCPA.

CONCLUSION

The decision of the Sixth Circuit Court of Appeals should be reversed, and the District court should be directed to enter summary judgment in favor of the Defendants.

Respectfully submitted,

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MARK J. SHERIFF, SARAH SHERIFF, WILES, BOYLE, BURKHOLDER & BRINGARDNER CO., LPA, AND MICHAEL DEWINE, ATTORNEY GENERAL OF OHIO,

Petitioners,

v.

PAMELA GILLIE AND HAZEL MEADOWS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Plaintiffs concede that Congress passed the Fair Debt Collection Practices Act ("Act") to bar defined "debt collectors" from "brutish" practices, like threatening debtors with jail or lying that their son's legs had been severed. Resp. Br. 15-16. This purpose reveals the wide gulf between this case and that Act. Plaintiffs sue the Attorney General's special counsel for following a traditional directive of the Attorney General's Office—to use its letterhead when recovering debts for the state creditors that the office (including special counsel) represents. For two reasons, the Act does not extend this far.

First, special counsel are not "debt collectors"; they are state "officers" appointed to represent state clients. Plaintiffs argue that special counsel cannot be "officers" because they contract with the office. But the special-counsel position exists with or without contracts. And the *common* meaning of "officer" includes "special" deputies who receive "the protection which the law affords to the regular officer." William Murfree, *A Treatise on the Law of Sheriffs and Other Ministerial Officers* § 83, p.48 (1884); *Filarsky v. Delia*, 132 S. Ct. 1657, 1664 (2012). That is why Plaintiffs cite cases on the *constitutional* meaning of "officer." And it is why they ignore the Dictionary Act's definition, which includes *any* person, not just *principal* officers. Plaintiffs' criticism of the special-counsel contracts also undercuts the Act's goals. Those contracts require counsel to follow its standards even for debts—like tax debts—as to which Plaintiffs concede it does *not* apply.

Second, special counsel's use of Attorney General letterhead *accurately* conveys that they send letters as special counsel, not private lawyers. Plaintiffs

read the Act to ban these letters—whether or not they mislead—because allegedly *only* employees may use an entity's letterhead. Plaintiffs cite nothing but a false analogy for this claim: that special counsel's use of Attorney General letterhead is like a private lawyer using a private creditor's letterhead. Resp. Br. 44; U.S. Br. 32. Yet the creditors here are *state universities*, not the *Attorney General's Office*. The latter entity is a debt-collecting law office. If anything, special counsel's use of the office's letterhead signals to debtors that they may call the office with concerns.

This suit exemplifies the "'cottage industry' of litigation that has arisen" under the Act. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 617 (2010) (Kennedy, J., dissenting) (citation omitted). Allowing it to proceed further would place that industry's interests above the interests of unsophisticated consumers, conscientious collectors, and sovereign States. The Court should not permit this distortion of the Act.

I. SPECIAL COUNSEL ARE STATE "OFFICERS"

A. Plaintiffs Misinterpret "Officer"

Plaintiffs interpret the term "officer" in both the Dictionary Act and the Act too narrowly.

1. Plaintiffs misread the Dictionary Act

Every judge to consider this case devoted pages to the Dictionary Act. Plaintiffs devote one. Resp. Br. 26. They instead seek a two-part test: (1) that "officers" must fill positions with duties and incidents set by statutes, not contracts, and (2) that "officers" must have continuing duties. *Id.* at 20 (citing *Metcalf &*

Eddy v. Mitchell, 269 U.S. 514 (1926)). This test contradicts text, history, and precedent.

Text. Plaintiffs ignore the text. Yet courts "must" consult the Dictionary Act when determining a law's meaning. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014). That rule applies especially to words, like officer, carrying many meanings—from a narrow constitutional meaning, *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890), to a broad popular one, *United States v. Hendee*, 124 U.S. 309, 313 (1888).

The Dictionary Act's text communicates the broad meaning. It covers *every* individual ("any person") statutorily empowered ("authorized by law") to perform sovereign duties ("duties of the office"). This codified the "sense in which the term 'officer' [was] understood in common language" in 1871. *Sanner v. State*, 2 Tex. App. 458, 459 (1877). It reached any "person commissioned or authorized to perform any public duty." 2 Noah Webster, *An American Dictionary of the English Language* (1828).

Plaintiffs' test conflicts with this text. "Authorized by law" means that a statute "empowers" a position; it does not require the statute to specify the position's details or prohibit its occupants from contracting. 1 *The Century Dictionary & Cyclopedia* 387 (1897). "Office" means a "public charge"; it does not require an indefinite one. *Rowland v. Mayor of N.Y.*, 83 N.Y. 372, 376 (1881).

History. Plaintiffs claim to apply officer's "historical" meaning. Resp. Br. 19. But they do not cite cases in the decades around 1871 for purposes of *clarifying* the Dictionary Act. *Cf. Lamar v. United States*, 241 U.S. 103, 112-13 (1916). They cite much

later cases—like *Metcalf*—for purposes of *overriding* it. A "transplanted" word "brings the old soil with it," not new soil that has yet to be cultivated. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947).

History undercuts Plaintiffs. Cases did not require a law to specify a position's duties; a superior could "prescribe" them. *United States v. Hartwell*, 73 U.S. 385, 393 (1867). Cases "uniformly" allowed officers and deputies to contract. *Cheek v. Tilley*, 31 Ind. 121, 126-27 (1869). And cases rejected "the idea[] that a public office must have continuance." *Clark v. Stanley*, 66 N.C. 59, 63-64 (1872). Thus, receivers or special deputies—appointed to liquidate *one* bank or perform *one* duty—were officers. *Stanton v. Wilkeson*, 22 F. Cas. 1074, 1075 (S.D.N.Y. 1876); *State v. Moore*, 39 Conn. 244, 250 (1872).

This is unsurprising. Government was long "'administered by members of society who temporarily or occasionally discharge[d] public functions.'" *Filarsky*, 132 S. Ct. at 1662 (citation omitted). While *Filarsky* held only that contractors received § 1983's immunities, Resp. Br. 34-35, it recounted how courts treated many contractors as officers. "[A]t common law," a special constable was "'as fully protected as any other officer.'" 132 S. Ct. at 1664 (citation omitted).

Precedent. Claiming to invoke the *common law*, Plaintiffs primarily invoke the *Constitution*. Resp. Br. 19-25. Several cases directly interpreted it. *United States v. Maurice*, 26 F. Cas. 1211, 1213-15 (C.C.D. Va. 1823), found an agent of fortifications to be an "officer" under the *Appointments Clause*. *Auffmordt* held that an appraiser was not such an officer. 137 U.S. at 326-28. *Burnap v. United States*,

252 U.S. 512, 517-19 (1920), held that a landscape architect need not be removed through the clause's methods. Finally, *Hall v. Wisconsin*, 103 U.S. 5, 7-11 (1880), asked whether the *Contracts Clause* protected a state contract—so the Court considered "office's" meaning *for that clause*.

Other cases read "officer" in criminal and tax statutes to adopt its *constitutional* meaning. Criminal laws trigger the rule of lenity. *Hendee v. United States*, 22 Ct. Cl. 134, 141 (1887). So the Court held that an extortion law reached *only* constitutional officers. *United States v. Germaine*, 99 U.S. 508, 509-10 (1878). Tax laws bring a *sui generis* history. *Collector v. Day*, 78 U.S. 113 (1871), held that the *Constitution* barred taxing a state officer's income. For decades, tax statutes exempted (or were interpreted to exempt) state "officers or employees." The exemptions targeted "those officers who under the Constitution could not be taxed." *Revenue Revision, 1925: Hearings Before the H. Com. On Ways and Means*, 69th Cong. 196-97 (1925) (Statement of Solicitor of Internal Revenue). When holding that engineers were not officers under a statutory exemption, *Metcalf* applied a *constitutional* meaning—as shown by its reliance on *Maurice*, *Hall*, *Germaine*, and *Auffmordt*. 269 U.S. at 519-20; *Buckner v. Comm'r*, 77 F.2d 297, 298 (2d Cir. 1935) (taxpayer immune "only if the imposition of tax would be unconstitutional"); *cf. Rand v. Comm'r*, 27 B.T.A. 182 (1932).

While these cases show what is *sufficient* for officer status, Plaintiffs claim they set *necessities*. But "officer" often is "used in a statute in a different sense from that in which [it is] used in the Constitution." *Lamar v. United States*, 240 U.S. 60, 65

(1916). This Court identified a "prohibition agent" as an officer under a search-warrant law, though not a constitutional officer. *Steele v. United States*, 267 U.S. 505, 506-08 (1925). Courts have treated "fiscal intermediaries"—private insurers—as federal "officers or employees" under Medicare. *Bodimetric Health Servs., Inc. v. Aetna Life & Cas.*, 903 F.2d 480, 487-88 (7th Cir. 1990). The United States believes that Special Federal Officers (those not employed by the federal government) fall within bans against assaulting officers. Brief for U.S. at 15-20, *in United States v. Luna*, 649 F.3d 91 (1st Cir. 2011). And Attorney General Kennedy found "intermittent consultants" to be "officers or employees" for former conflict-of-interest laws. 42 Op. Att'y Gen. 111, 111 (1962).

In sum, Plaintiffs' reliance on constitutional cases is like relying on *Employment Division v. Smith*, 494 U.S. 872 (1990), as the reason why a religious-liberty claim fails the Religious Freedom Restoration Act. The Dictionary Act adopts a common, not a constitutional, meaning of "officer."

2. Plaintiffs misread the Act

The Act's text and the clear-statement rule show that it incorporates the Dictionary Act's broad definition. Plaintiffs' responses fail.

Text. Plaintiffs interpret "officer" in the government exemption narrowly because "officer" in the creditor exemption is narrow. They say: (1) the *text* must mean the same thing in both places, and (2) the exemptions' *purpose* distinguishes covered collectors *outside* a creditor from exempt collectors *inside* a

creditor—for private and public creditors alike. Resp. Br. 17-19. Not so.

Start with text. The "presumption of consistent usage readily yields to context." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441-42 (2014) (internal quotation marks omitted). The United States knows this well. *King v. Burwell*, 135 S. Ct. 2480, 2493 n.3 (2015) ("established by the State" can "mean different things in different places"). "Officer" of a creditor conveys something different from "officer" of a government. The "creditor" definition (covering "person[s]") limits it to *private* corporations. 15 U.S.C. § 1692a(4); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780-81 (2000). "In corporations," officer means "a person charged with important functions of management such as president, vice president, treasurer, etc." *Black's Law Dictionary* 977 (5th ed. 1979); 2 Fletcher Cyc. Corp. § 266 (1990). In governments, "officer" means a person "'who hath any duty concerning the public, and he is not the less a public officer where his authority is confined to narrow limits.'" Floyd Mechem, *A Treatise on the Law of Public Offices and Officers* § 9, p.7 (1890) (citation omitted). Police officers qualify, *Policemen as Public Officers*, 84 A.L.R. 309 (1933), as do notaries, Mechem, *supra*, § 47, p.18.

Turn to purpose. Plaintiffs' distinction between collectors inside and outside of creditors reads the creditor exemption too broadly and the government exemption too narrowly. The *narrow* creditor exemption exists because a creditor's reputational concerns will lead it to respect debtors. S. Rep. No. 95-382, at 2 (1977). The Act excludes creditors *only* when collecting "in the[ir] name," 15 U.S.C. § 1692a(6)(A), not

otherwise, *id.* § 1692a(6). The *broad* government exemption exists to respect governments—period. It excludes governments no matter the name they use. *Id.* § 1692a(6)(C). It excludes them when they are *outside* collectors—such as the United States collecting for States. Pet. App. 59a (Sutton, J., dissenting). It even excludes "sheriffs" executing judgments for *private* creditors. S. Rep. No. 95-382, at 3. They can appoint special deputies, 80 C.J.S. *Sheriffs and Constables* § 44, who historically received the same protections, Murfree, *supra*, § 83, p.48.

Clear-Statement Rule. Plaintiffs contend that the clear-statement rule does not apply because "Congress spoke clearly." Resp. Br. 35. Yet they conceded below that officer was ambiguous. Pet. App. 60a (Sutton, J., dissenting).

Plaintiffs next argue that laws "'touch[ing] a sensitive area'" do not trigger the rule. Resp. Br. 37. Yet it applies "[i]n traditionally sensitive areas." *United States v. Bass*, 404 U.S. 336, 349 (1971). If the rule applies to criminal laws that do not regulate States, *id.*, it applies to Plaintiffs' efforts to divide an officer from the officer's deputies. Just as *Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002), preserved Ohio's "traditional right" to delegate to municipalities, Resp. Br 37, the Court should preserve Ohio's traditional right to delegate to part-time officers, *Filarsky*, 132 S. Ct. at 1662-63.

Plaintiffs retort that Ohio has no interest in the "thuggish methods" barred by the Act. Resp. Br. 36. Such rhetoric could be used in most cases triggering the clear-statement rule. States are uninterested in violating the Constitution, but § 1983 incorporates traditional immunities. That is because States *do*

have an interest in "preventing the harmful distractions from carrying out the work of government that can often accompany damages suits." *Filarsky*, 132 S. Ct. at 1665. This case is Exhibit A. For years, the Attorney General's Office and special counsel have spent time and expense defending against Plaintiffs' attack on the way the office operates. This has distracted them from "vital" operations. J.A. 128.

Plaintiffs lastly seek to jettison the clear-statement rule, asserting that this *statutory* rule is like the *constitutional* rule rejected by *Garcia v. San Antonio Transit Authority*, 469 U.S. 528 (1985). Resp. Br. 39. There is a big difference between the legislative "clarity" question here (whether Congress has *clearly* intruded on state interests) and the legislative "power" question there (whether Congress may *constitutionally* do so). *Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 698 (1999) (Breyer, J., dissenting). *Garcia* mandates the clear-statement rule: "[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." Laurence Tribe, *American Constitutional Law* § 6-25, p.480 (2d ed. 1988).

B. Plaintiffs' Arguments Confirm Special Counsel's "Officer" Status

Special counsel are legally authorized to perform sovereign duties.

1. *Authorized By Law.* Plaintiffs say state law does not identify an "office of [the] special counsel." Resp. Br. 22. Yet a party's "official or unofficial character" is determined "by the nature of the[ir]

functions," not "their name." *State ex rel. Att'y Gen. v. Kennon*, 7 Ohio St. 546, 557-58 (1857). The law in *Hartwell* did not identify an "office of the clerk"; it permitted a superior to "appoint" the clerk. 73 U.S. at 392-93. Federal law does not even identify an "office of Solicitor General." It permits the President to appoint "a Solicitor General, learned in the law, to assist the Attorney General in the performance of his duties." 28 U.S.C. § 505. Magic language is not required.

Plaintiffs next say Ohio law "prescribe[s] no particular duties" for special counsel. Resp. Br. 22. That is wrong: Ohio Rev. Code § 109.08 identifies *precise* duties—recovering debts. It is also irrelevant: A superior may specify the duties. Beyond *Hartwell*, 73 U.S. at 393, "many cases" hold "that an employment may be none the less an *office*, although the duties are to be prescribed by a superior." *Patton v. Bd. of Health*, 59 P 702, 706 (Cal. 1899).

Because officers must be *legally* authorized, Plaintiffs claim, the *contracts* disqualify special counsel. Resp. Br. 22-23. They stretch this rule too far. It does not bar officers from contracting; it bars non-officers from saying contracts give them "officer" status. The special-counsel position arises from laws, not contracts. Ohio identifies it within its "civil service," Ohio Rev. Code § 124.11(A)(11), which includes "offices and positions of trust," *id.* § 124.01(K). That an Attorney General *also* contracts with special counsel does not change things. As one court said when finding a special deputy to be an officer, "[w]hether the sheriff pays him a salary or not, or is bound to bear his official expenses, is a matter of contract between them with which the public have

nothing to do, and the terms of which can not change his official character." *Reves v. State*, 79 Tenn. 124, 126 (1883); *Bynum v. Knighton*, 73 S.E. 400, 400 (Ga. 1911). Likewise, deputy marshals once "contract[ed] with the marshal for [their] compensation." *Powell v. United States*, 60 F. 687, 689 (M.D. Ala. 1894).

Plaintiffs also mistakenly cite specific contract provisions. Resp. Br. 22-23. Terms barring special counsel from invoking laws regarding the defense and indemnification of officers would be superfluous if special counsel were not officers. *Bell v. Newnham*, 1990 WL 131972, *2 (Ohio Ct. App. Sept. 14, 1990). And those laws are waivable; they "do not deprive any officer or employee of the right to select counsel of his own choice or settle his case at his own expense." Ohio Rev. Code § 109.361. The public-records laws are not waivable. Plaintiffs' assertion that the Attorney General cannot evade those laws by outsourcing collection (Resp. Br. 23 n.2) is a concession that special counsel perform "governmental function[s]." *State ex rel. Schiffbauer v. Banaszak*, 33 N.E.3d 52, 54-55 (Ohio 2015). Regardless, officer's meaning in *state law* is irrelevant because "officer" *in the Act* looks to general principles. *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989).

Plaintiffs next assert that special counsel cannot be officers because the Attorney General may appoint *undefined* numbers. Resp. Br. 24-25. Many "officer" positions do not identify precise numbers. The U.S. Attorney General "may appoint" an undefined number of assistant U.S. Attorneys, 28 U.S.C. § 542, who have been called officers in the "strictest sense," 31 Op. Att'y Gen. 201, 205 (1918). Sheriffs also could appoint any number of deputies. 80 C.J.S.

Sheriffs and Constables § 33; *Taylor v. Brown*, 4 Cal. 188, 188 (1854). Just as special deputies perform assigned duties, *Moore*, 39 Conn. at 250, so too do special counsel.

Citing Mechem, *supra*, § 38 p.17, Plaintiffs respond, special deputies are not officers. Resp. Br. 33. Mechem relied on dicta from *Kavanaugh v. State*, 41 Ala. 399 (1868). The Alabama Supreme Court *rejected* its dicta when holding that special deputies fell within officer's "generic meaning." *Andrews v. State*, 78 Ala. 483, 485 (1885); *see also, e.g.*, *Putman v. State*, 5 S.W 715, 717 (Ark. 1887); *Reves*, 79 Tenn. at 126; *Moore*, 39 Conn. at 250; *Dungan v. Hall*, 64 Ill. 254, 255 (1872); Murfree, *supra*, §§ 83, 1121, pp.48, 609; Richard Clarke Sewell, *A Treatise on the Law of Sheriff* 46 (1842).

2. *Sovereign Duties.* Plaintiffs say that special counsel do not "execute" laws. Resp. Br. 28. Yet they execute the law requiring the Attorney General to collect debts. Litigation is a sovereign task. *Commonwealth v. Evans*, 74 Pa. 124, 139-40 (1874); *People v. Miner*, 2 Lans. 396, 398 (N.Y. Sup. Ct. 1868). Only *constitutional* officers may undertake "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights." *Buckley v. Valeo*, 424 U.S. 1, 140 (1976).

Even so, Plaintiffs respond, special counsel lack *independent* authority. Resp. Br. 29-30; U.S. Br. 20. Independence is not required. An entire category of officers (ministerial) "'execute the mandates, lawfully issued, of their superiors.'" Mechem, *supra*, § 21, p.10 (citation omitted); 2 John Bouvier, *A Law Dictionary* 203 (1839) (ministerial office "give[s] the officer no power to judge of the matter to be done, and

require[s] him to obey the mandates of a superior"). Even some constitutional officers lack independence. A "*necessary* condition" of "inferior" officers is that they be "subordinate." *Morrison v. Olson*, 487 U.S. 654, 722 (1988) (Scalia, J., dissenting).

Plaintiffs counter that *this case* involves sending letters, not filing complaints. Resp. Br. 29. But "officer" status depends on a position's overall duties. And "legal services" are public charges. J.A. 173. The Attorney General is an "officer" when sending letters, as are special counsel. *Cf. Disciplinary Counsel v. Brown*, 905 N.E.2d 163, 167 (Ohio 2009) (practicing law includes sending collection letters and negotiating claims). Even under the Constitution, "that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status." *Freytag v. Comm'r*, 501 U.S. 868, 882 (1991).

No Oath. Plaintiffs note that special counsel take no oaths. Resp. Br. 25. Neither the Dictionary Act nor the common law required this. An oath was "not an indispensable criterion and the office may exist without it." Mechem, *supra*, § 6 p.6; *Turner v. Holtzman*, 54 Md. 148, 159 (1880).

* * *

The clear-statement rule applies because it is at least ambiguous whether special counsel are officers. Congress *itself* thought so. As Plaintiffs note (Resp. Br. 18), it said that private lawyers collecting *federal* debts were "debt collectors" "[n]otwithstanding" the Act's exemptions. 31 U.S.C. § 3718(b)(6). Plaintiffs' view makes this provision superfluous. Congress

reasonably could have believed that the attorneys were "officers" in a broad *statutory* sense. Officials opined that unless they were "'closely supervised and controlled'" they would be *constitutional* officers. 12 Op. O.L.C. 18, 26 n.16 (1988) (citation omitted).

C. Plaintiffs Exaggerate The Effect Of A Ruling For Special Counsel

Plaintiffs suggest that a ruling for special counsel would leave *all* debt collectors collecting public debts "free" to harass debtors. Resp. Br. 16-18. That is legally and factually overstated.

Legally, a special-counsel ruling would not cover everyone collecting public debts. The Attorney General's Office, for example, contracts with collection agencies to assist in non-litigation. J.A. 124. But no law authorizes the Attorney General to "appoint" these entities to a position; their relationship is *solely* contractual. Special counsel, by contrast, have long been legally empowered to perform the Attorney General's duties. Pet. Br. 4-5.

Factually, a special-counsel ruling would not leave them "free" to harass debtors. Tax debts prove the point. Although they fall outside the Act, the office requires counsel to abide by the Act's "standards" in that context as elsewhere, and can seek "sanctions" for non-compliance. J.A. 194. It expects counsel to provide services "in a manner that will preserve or enhance [the office's] goodwill." J.A. 193. These are demanding deterrents against abuse enforced by an elected officer and a public office. They surpass the "goodwill" deterrent that led Congress to exempt creditors. S. Rep. 95-382, at 2.

II. Special Counsel's Letters Comport With § 1692e

Plaintiffs wrongly argue: that special counsel violated § 1692e(9) and (14); that those subsections do not require materiality; and that the least-sophisticated-consumer test applies.

A. Plaintiffs Misread § 1692e(9) And (14)

Special counsel did not violate § 1692e(9) or (14) because the letterhead accurately conveyed that the signatories sent the letters in a special-counsel capacity with the Attorney General. In response, Plaintiffs ask this Court to "hold" that the letters violate those subsections. Resp. Br. 60. Yet the Sixth Circuit directed this question to a jury, Pet. App. 54a, and a cross-petition was required "to alter [its] judgment," *Nw. Airlines, Inc. v. Cnty. of Kent*, 510 U.S. 355, 364 (1994). Regardless, Plaintiffs do not even identify a fact dispute.

1. *Simulation Prohibition.* Plaintiffs argue that special counsel's letters simulate documents "*issued*" by the Attorney General's Office and falsely imply that the office is their "*source*." Resp. Br. 41. That is so, Plaintiffs say, because the letterhead suggests that counsel are "employees." *Id.*; U.S. Br. 32-33 (stating that letterhead implies sender is a "member or employee," without defining "member"). This is mistaken.

First, Plaintiffs' argument finds no support in the cited words. "To issue" means to "distribute in an official capacity." *American Heritage Dictionary* 695 (1969); *Black's*, *supra*, at 745. A "source" is the "person or thing that originates, sets in motion, or is a primary agency in producing" something. *Black's*,

supra, at 1251; *Am. Heritage*, *supra*, at 1235. Under those definitions, the Attorney General's Office *issues* the letters and is a *source*. True, the *inanimate* office cannot "issue" or be the "source" of anything. It acts through *people*, and state law permits special counsel to act for the office. Special counsel "distribute" letters in their "official capacity" as special counsel to the Attorney General. *Am. Heritage*, *supra*, at 695. And the office "is a primary agency" for the letters, *Black's*, *supra*, at 1251, because special counsel act for that office.

Second, Plaintiffs' argument finds no support in subsection (9) as a whole. That subsection, which does not mention "employees," does not restrict a State's ability to issue "communication[s]" through whomever it pleases. Many courts use "attorneys to issue subpoenas in the name of the clerk." *Jensen v. Pressler & Pressler*, 791 F.3d 413, 416 (3d Cir. 2015). That does not violate subsection (9) because the court *permits* the attorneys to do so. This case is easier. Private attorneys have almost no connection to a clerk; special counsel have a working relationship with the Attorney General's Office.

Third, Plaintiffs' argument finds no support in general principles. They cite *nothing* suggesting that a person's use of an entity's letterhead implies the person is an *employee*. As Judge Sutton noted, *contractor* agents use their principal's letterhead. Pet. App. 65a-67a. A party's use of another's letterhead does not even permit third parties to assume an *agency*—let alone an *employment*—relationship. One court "could find no cases" where "giving someone" "company stationery, by [itself], created sufficient indicia of apparent authority." *CSX Transp., Inc. v.*

Recovery Express, Inc., 415 F. Supp. 2d 6, 11-12 (D. Mass. 2006); *Drake v. Maid-Rite Co.*, 681 N.E.2d 734, 738 (Ind. Ct. App. 1997). Another found the "use of a trademark not sufficient to raise a genuine issue of material fact" that an actor was an agent. *Theos & Sons, Inc. v. Mack Trucks, Inc.*, 729 N.E.2d 1113, 1121 (Mass. 2000).

Fourth, Plaintiffs' argument finds no support in comparing special counsel's use of Attorney General letterhead to a private lawyer's use of client letterhead. Resp. Br. 43-44; U.S. Br. 32. The Attorney General is the *lawyer*, not the *client*. The clients are the creditors that the office represents through both assistant attorneys general and special counsel—here, state universities. Special counsel do *not* use university letterhead. Unlike a lawyer and client, moreover, special counsel "work closely *with* Attorney General staff." J.A. 127 (emphasis added). Assistant attorneys general "assist Special Counsel in drafting pleadings, and sometimes join cases as co-counsel." J.A. 130. Special counsel must follow office procedures for preserving records, interacting with debtors, and the like. J.A. 177-78, 191-93, 388. This is not a lawyer-client relationship; it is a lawyer-lawyer relationship.

Fifth, Plaintiffs' arguments find no support in their cases. Resp. Br. 42 n.8. Those cases address letters that did *not* "disclose the identity of the actual sender." *E.g.*, *Del Campo v. Am. Corrective Counseling Servs., Inc.*, 718 F. Supp. 2d 1116, 1134 (N.D. Cal. 2010). Special counsel disclose their identities.

2. *True-Name Provision.* Plaintiffs argue that special counsel's "true name" cannot be both the Attorney General's Office and their firm names. Resp.

Br. 45-47 Plaintiffs rightly disavowed this "two-name theory" below. J.A. 422.

A "true" name is one "conformable to the actual state of things." *Black's*, *supra*, at 1351. Special counsel use Attorney General letterhead with their names and the notation "outside" or "special" counsel. Pet. App. 14a, 17a. That reflects the "actual state of things." A collector may use "multiple names if it consistently uses the same name when dealing with a particular consumer." FTC Staff Commentary, 53 Fed. Reg. 50097, 50107 (Dec. 13, 1988). The contracts require special counsel to notify debtors *consistently* that they are special counsel to the Attorney General. J.A. 173. That name distinguishes the lawyer *as special counsel* collecting debts with a public office from the same lawyer *as private debt collector* collecting debts with a private firm.

Plaintiffs also argue that § 1692e(14) exists primarily to prohibit debt collectors from purporting to be creditors. Resp. Br. 46-47. It exists primarily for the *opposite* reason—to prohibit creditors from pretending to be debt collectors (thereby avoiding risk to their *reputations*). *See* 53 Fed. Reg. at 50107. "Debt collector" is defined to include creditors who use pseudonyms, 15 U.S.C. § 1692a(6), and § 1692e(14) bars debt collectors from using pseudonyms. Regardless, special counsel do not purport to be universities. They purport to be special counsel to the Attorney General's Office (which has an incentive to monitor them by placing *its* reputation on the line).

Plaintiffs lastly claim that special counsel may explain their connection "to the client" in the letter's body. Resp. Br. 47 The Attorney General is *not* a "client." And § 1692e(14) bars "us[ing]" an untrue

name *anywhere*. If the office is not a "true name" in letterhead, the subsection would bar special counsel from "using" its name in the body, the signature block, oral communications, or a complaint.

* * *

Two final points. For one, the Court should not read these subsections in a vacuum; it should read them with § 1692e as a whole. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 24 (2012). Just as the general phrase "navigable waters" can determine the meaning of "waters of the United States," so too § 1692e's general ban on false or misleading statements signals what "Congress had in mind" with specific subsections. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001). That these letters do not mislead shows that they fall outside the text of subsections (9) and (14).

For another, subsections (9) and (14) are at least ambiguous, triggering the clear-statement rule. Plaintiffs read the Act as transferring from *attorneys general* to *private parties* the power to decide who may use their office's letterhead. This "trench[es] on the States' arrangements for conducting their own governments." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004). And while the United States says the Act preserves "intergovernmental comity," U.S. Br. 23, its brief promotes intergovernmental tension by siding with private parties on that question. The Act should be read to leave the answer where it belongs—with the State.

B. Plaintiffs Wrongly Eliminate Materiality

Plaintiffs argue that subsections (9) and (14) contain no "materiality" element, and that a jury could find that the alleged misrepresentation here was material. Resp. Br. 47-56. They err on the *law* and its *application*.

Law. Plaintiffs claim the text of subsections (9) and (14) precludes materiality. Yet, as circuit courts recognize, "[m]ateriality is an ordinary element of any federal claim based on a false or misleading statement." *Hahn v. Triumph P'ships, LLC*, 557 F.3d 755, 757 (7th Cir. 2009); *Jensen*, 791 F.3d at 417 (citing cases). The subsections here use text that falls within that rubric—e.g., "falsely represent," 15 U.S.C. § 1692e(9), or use a name "other than" a "true" name, *id.* 1692e(14). *Cf.* 53 Fed. Reg. at 50107 (noting that "collector may use a name that does not misrepresent his identity or deceive the consumer").

Examples from each subsection illustrate this point. For § 1692e(9), an attorney who issues a valid subpoena under the wrong clerk's name makes "a 'false representation' in the most technical sense." *Jensen*, 791 F.3d at 417 But it is not material because it could not affect debtors. *Id.* at 422. For § 1692e(14), when Chase Bank collects debts as "Chase Auto Loans," not "JPMorgan Chase Bank, N.A.," it uses a name technically other than its true name. *Berk v. J.P. Morgan Chase Bank, N.A.*, 2011 WL 4467746, *4 (E.D. Pa. Sept. 26, 2011). But "no reasonable person would find that 'Chase Auto Loans' is a false identification of" Chase. *Id.* Recognizing that Congress did not intend "such hair-splitting" recognizes materiality. *Id.*

Contrary to Plaintiffs' claim (Resp. Br. 50-51), the absence of intent and injury elements in the Act reinforces the materiality element. While those provisions fulfill Congress's purpose to punish real abuse, materiality fulfills Congress's purpose to protect honest collectors. 15 U.S.C. § 1692(e). Thus, when rejecting a mistake-of-law defense, the Court stated that the Act's "conduct-regulating provisions" (like § 1692e) "should not be assumed to compel absurd results when applied to debt collecting attorneys." *Jerman*, 559 U.S. at 600. Without materiality, the Act opens the door to damages for "misrepresentations" about a letter's color, *Hahn*, 557 F.3d at 757, or for dropping "LLC" from a name.

Application. Plaintiffs' materiality theories do not match their falsity theory—that the letters imply that special counsel are "employees," Resp. Br. 41. Nowhere do Plaintiffs explain—or cite anything in the record to suggest—why consumers would care about this legal distinction between employees and contractors. The average consumer (perhaps even the average lawyer) likely does not know that this distinction often turns on a multi-factored balancing test that can lead to different conclusions across a range of laws. *Cf. Reid*, 490 U.S. at 751-52. Special counsel, moreover, have the same powers as assistant attorneys general *vis-à-vis debtors*. Pet. Br. 51-52. The debts are also subject to all of the same priorities—e.g., the State's ability to use tax refunds in satisfaction, Ohio Rev. Code § 5747.12, or to collect for an extended period, J.A. 125.

Plaintiffs' materiality theories turn, not on the *allegedly untruthful* implication that special counsel are employees, but on the *entirely truthful* implica-

tion that the Attorney General's Office collects debts. Most consumers do not know that the office is "in the collections business," Plaintiffs say, so the *mere* use of its name leads debtors to fear "criminal penalties or other severe consequences." Resp. Br. 53. These allegations conflict with Plaintiffs' concession that special counsel may *identify* the office in the letters. Resp. Br. 47 They also suggest that the office's employees *themselves* would violate the Act (but for the government exemption) when they send letters to debtors on office letterhead before special counsel get involved. J.A. 124. But "[t]hrough the structure of its government, a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Plaintiffs' reading of materiality "trench[es] on" the manner in which Ohio has long collected debts. *Nixon*, 541 U.S. at 140.

C. Plaintiffs Cannot Salvage The Least-Sophisticated-Consumer Test

Courts should consider whether a statement is misleading from an average consumer's perspective. Pet. Br. 40-43. While Plaintiffs call this issue "waived" (Resp. Br. 56), it is "included" in the second question, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379-80 (1995).

Their argument that "little daylight" separates these standards also does not help them. Resp. Br. 57. It proves Judge Easterbrook's point that courts adopting the least-sophisticated-consumer test do so in *name*, but apply another rule in *practice*. *Gammon v. GC Servs. Ltd. P'ship*, 27 F.3d 1254, 1259 (7th Cir. 1994) (Easterbrook, J., concurring). Courts preserve a reasonableness standard, which requires showing that "a significant fraction of the letter's ad-

dressees [could be] deceived—for if showing a handful of misled debtors were enough, [courts] would as a practical matter be using the 'least sophisticated consumer' doctrine." *Id.* at 1260.

Plaintiffs respond that a reasonableness test will not protect the *most* unsophisticated. Resp. Br. 57-58. But "'no legislation pursues its purposes at all costs.'" *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014) (citation omitted). The Act has a *competing* purpose to protect conscientious collectors. 15 U.S.C. § 1692(e). Plaintiffs also fail to show their test's "historical pedigree." Resp. Br. 58-59. They cite cases from the FTC Act and trademark law, but courts there look to *reasonable* consumers. Pet. Br. 40-43.

The United States advocates for a reasonable-unsophisticated-consumer test—an average consumer under another name. U.S. Br. 34. Rejecting the least-sophisticated-consumer test becomes imperative if, as the United States notes (U.S. Br. 30), a jury should usually decide whether a consumer could be misled. *Hana Fin., Inc. v. Hana Bank*, 135 S. Ct. 907, 911 (2015). The least-sophisticated-consumer test would mislead *jurors*. Regardless, "a judge may decide" this "question on a motion for summary judgment" when "the facts warrant it." *Id.* at 911; *Scott v. Harris*, 550 U.S. 372, 378-79 (2007). They warrant it here. The United States' paragraphs on why a fact question exists cite nothing but the letters. U.S. Br. 32-33. Judge Sutton could not have said it better: "How these letters could be misleading is beyond me." Pet. App. 8a. No jury could find a violation of § 1692e.

CONCLUSION

The judgment of the court of appeals should be reversed.

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In the Supreme Court of the United States

MARK J. SHERIFF, ET AL., PETITIONERS

v.

PAMELA GILLIE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether "special counsel" appointed by the Attorney General of Ohio to collect debts owed to the State are exempted from the definition of "debt collector" under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*, because they are "officer[s]" of the State.

2. Whether special counsel's use of the Ohio Attorney General's letterhead on their communications to debtors violated the FDCPA.

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BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The Fair Debt Collection Practices Act (FDCPA or Act), 15 U.S.C. 1692 *et seq.*, authorizes the Consumer Financial Protection Bureau (CFPB) to "prescribe rules with respect to the collection of debts by debt collectors, as defined in" the FDCPA. 15 U.S.C. 1692*l*(d). The CFPB and other federal regulatory agencies are responsible for enforcing the Act through administrative proceedings and civil litigation. 15 U.S.C. 1692*l*(a)-(c). In addition, private counsel who assist in collecting debts owed to the United States are subject to the Act's requirements. See 31 U.S.C. 3718(b)(1)(A) and (6). The United States therefore has a substantial interest in the Court's resolution of the questions presented.

STATEMENT

1. a. Congress enacted the FDCPA in 1977 based on "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. 1692(a). Congress concluded that "[e]xisting laws * * * are inadequate to protect consumers," and that "the effective collection of debts" does not require "misrepresentation or other abusive debt collection practices." 15 U.S.C. 1692(b) and (c). The Act subjects debt collectors to various procedural and substantive requirements that are designed to "eliminate abusive debt collection practices by debt collectors" while "insur[ing] that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. 1692(e).

The FDCPA applies to any "debt collector," a term that the Act generally defines as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6). The Act's definition of "debt collector" specifically excludes, *inter alia*, "any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor," 15 U.S.C. 1692a(6)(A), and "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties," 15 U.S.C. 1692a(6)(C).

The FDCPA prohibits debt collectors from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt."

15 U.S.C. 1692e. In addition to that general prohibition, Congress has identified 16 specific practices that violate Section 1692e. As relevant here, the prohibited practices include the "use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval," 15 U.S.C. 1692e(9), and the "use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization," 15 U.S.C. 1692e(14). The Act authorizes civil actions against "any debt collector who fails to comply with any provision of [the FDCPA] with respect to any person." 15 U.S.C. 1692k.

b. The Attorney General of Ohio is charged by state law with collecting debts owed to the State. Ohio Rev. Code Ann. § 131.02 (LexisNexis 2014). Ohio law authorizes the Attorney General to "appoint special counsel to represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect." *Id.* at § 109.08. Section 109.08 further provides that "[s]uch special counsel shall be paid for their services from funds collected by them in an amount approved by the attorney general." *Ibid.*

The statute directs the Ohio Attorney General to provide special counsel appointed to collect tax debts "the official letterhead stationery of the attorney general." Ohio Rev. Code Ann. § 109.08 (LexisNexis 2014). It also requires such counsel to "use the letterhead stationery, but only in connection with the collec-

tion of such claims arising out of those taxes." *Ibid.* Individuals hired by Ohio as special counsel have been orally directed by the Attorney General to use the letterhead of the Office of the Attorney General in connection with all collections. Pet. App. 24a.

To choose the individuals who will assist Ohio officials in collecting debts owed to the State, the Attorney General issues a "Request for Qualifications" for collections special counsel. Pet. App. 23a. Applicants selected as special counsel enter into a "Retention Agreement" with the Attorney General, *ibid.*; see J.A. 170-205, under which "Special Counsel and its employees" agree to "conduct any and all legal and collection work assigned by the Attorney General," and to "render [such] services * * * as an independent contractor," J.A. 171, 173.

2. In 2012, each respondent received a debt-collection letter signed by an individual who was or purported to be a special counsel hired by the Ohio Attorney General. See Pet. App. 25a-26a, 71a-76a.

The letter sent to respondent Pamela Gillie included letterhead from the Ohio Attorney General's office. Pet. App. 73a. The letterhead contained the Attorney General's name and title, as well as the official state seal. *Ibid.* The letter was signed by "Eric A. Jones, Outside Counsel for the Attorney General's Office," and contained a payment coupon listing the "Law Office of Eric A. Jones, L.L.C." as the payee's address. *Ibid.* Gillie's affidavit stated that she believed that the letter was from the Attorney General and that Eric Jones "was someone from the Ohio Attorney General's Office," but that she was confused by the inclusion of the other names. J.A. 136; Pet. App. 26a.

The letter sent to respondent Hazel Meadows included a different version of the Ohio Attorney General's letterhead, containing the state seal with the designation "Office of the Ohio Attorney General, Collection Enforcement Section." Pet. App. 76a. That letter was signed by Sarah Sheriff of Wiles, Boyle, Burkholder & Bringardner Co., I.P.A., with the title of "Special Counsel to the Attorney General of the State of Ohio." *Ibid.* It is undisputed that the special counsel assigned to the Meadows debt was Mark Sheriff, not Sarah Sheriff. *Id.* at 78a, 97a. Meadows stated in an affidavit that "it was hard to tell" who had sent the letter to her because "the top of the letter * * * showed it was from the Ohio Attorney General's Office," but the envelope the letter came in indicated it was from the law firm. J.A. 139; Pet. App. 26a.

3. In March 2013, respondents filed this action against petitioners Eric Jones, Sarah Sheriff, Mark Sheriff, and their respective law firms, alleging that the use by Ohio's debt-collection special counsel of letterheads from the Office of the Attorney General (OAG) violated various prohibitions in 15 U.S.C. 1692e. Pet. App. 80a. In particular, plaintiffs alleged that use of the OAG letterhead "created a false impression that the OAG was the source of the letters," in violation of 15 U.S.C. 1692e(9), and that the letters used a name other than the "true name" of the debt collector's business or company, in violation of 15 U.S.C. 1692e(14). Pet. App. 80a. The Ohio Attorney General intervened in support of the attorneys and law firms. *Id.* at 27a, 81a.

The district court granted petitioners' motion for summary judgment. The court held that Ohio's spe-

cial counsel are "officer[s]" of the State within the meaning of 15 U.S.C. 1692a(6)(C) and therefore are excluded from the FDCPA's definition of "debt collector." Pet. App. 27a, 84a-90a. The district court also concluded that, even if the special counsel were "debt collector[s]" under the FDCPA, their use of OAG letterhead did not violate the Act because the letters "accurately reflect" special counsel's role "as representatives of the State of Ohio appointed by the OAG to collect debts owed to the State." *Id.* at 27a-28a, 91a-98a. The court explained that "[a]ny initial confusion" caused by the letterhead "is dispelled by special counsel's signature in which they identify themselves and their relationship to the OAG." *Id.* at 98a.

4. The court of appeals reversed. Pet. App. 18a-54a.

a. The court of appeals held that Ohio's special counsel do not qualify for the state-officer exemption from the FDCPA's definition of "debt collector" because they are not "officer[s]" as defined by the Dictionary Act, 1 U.S.C. 1. That statute defines "officer" to "include[] any person authorized by law to perform the duties of the office." *Ibid.* The court explained that the Ohio statutes authorizing the appointment of special counsel to collect debts owed to the State "do not authorize special counsel to fulfill the duties of any office." Pet. App. 31a; see *id.* at 31a-44a. On the contrary, the court reasoned, the relevant provision of state law "simply establishes the framework under which the Attorney General, within his or her discretion, may delegate the collection of debts to a third-party debt collector." *Id.* at 32a.

The court of appeals rejected petitioners' argument that special counsel qualify as officers because they

exercise a "sovereign power." Pet. App. 35a-36a. The court explained that the "authority to collect consumer debts is not a sovereign power" because it "can be exercised by any creditor." *Id.* at 35a. The court further held that, even if the Dictionary Act did not apply, Ohio's special counsel would not qualify as officers because they are "independent contractors" of the State. *Id.* at 38a.

On the merits of respondents' FDCPA claims, the court concluded that the dunning letters would violate the FDCPA if they contained a representation that "has the tendency to confuse the least sophisticated consumer." Pet. App. 48a. The court noted that the letters contained misrepresentations "in a technical sense" because the Attorney General's name in the letterhead was "not the true name of any Defendant" and because "Sarah Sheriff is not a special counsel." *Ibid.* The court concluded, however, that each letter, when read as a whole, may have "clarif[ied] the confusing impact of the letterhead for the least sophisticated consumer." *Id.* at 50a. Finding that question to be one "for the jury," *id.* at 51a, the court remanded the case for trial, *id.* at 54a.

b. Judge Sutton dissented. Pet. App. 55a-70a. Applying the Dictionary Act's definition of "officer," Judge Sutton would have held that Ohio's special counsel are "authorized by law" because Ohio Revised Code Ann. § 109.08 (LexisNexis 2014) "permits any action [special counsel] take when they invoke their attorney-general-given authority." Pet. App. 57a; *id.* at 56a-63a. He also concluded that special counsel fulfill the "duties of the office" because "[i]n their hands rests nothing less than a portion of the Attorney General's sovereign power to 'enforce' the civil

code the Ohio legislature has crafted." *Id.* at 57a. Relying on *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), Judge Sutton would have required a clear statement that Congress intended the FDCPA to cover these special counsel because doing so would amount to federal regulation of "core state functions." Pet. App. 58a.

Judge Sutton also would have held that no reasonable jury could find the special counsel's use of OAG letterhead to be materially misleading. Pet. App. 63a-70a. In his view, Ohio's special counsel are agents of the Attorney General, and "an agent who uses his principal's letterhead speaks the truth." *Id.* at 64a.

c. The court of appeals denied petitioners' petition for rehearing en banc. Pet. App. 1a. Judge Sutton, joined by four other judges, filed an opinion dissenting from the denial of rehearing. *Id.* at 7a-11a. Judge Clay filed an opinion concurring in the denial. *Id.* at 2a-7a.

SUMMARY OF ARGUMENT

I. Ohio's debt-collection special counsel are subject to the FDCPA because they fall within the Act's basic definition of "debt collector" and they are not state "officer[s]" exempt from the Act's requirements and prohibitions. Courts have traditionally determined whether an individual was a government "officer" by examining the nature, quality, and source of the individual's duties and authority. Ohio special counsel do not occupy any state "office," and they do not exercise any portion of the State's sovereignty. Rather, their duties are defined solely by contracts that expressly declare special counsel to be "independent contractor[s]." J.A. 173.

The FDCPA's structure and purposes reinforce the conclusion that Ohio's debt-collection special counsel are not state "officer[s]" within the meaning of Section 1692a(6)(C). The FDCPA draws a fundamental distinction, with respect to both private and governmental creditors, between a creditor's use of in-house personnel to collect debts owed to it and a creditor's retention of outside contractors to perform the same basic function. And for both private and governmental creditors, Congress has used the phrase "officer or employee" to describe the persons who may collect debts for the creditor without triggering the Act's requirements. See 15 U.S.C. 1692a(6)(A) and (C). If applied to private creditors under Section 1692a(6)(A), petitioners' expansive conception of "officer" would wholly subvert Congress's purposes, because it would exempt the very persons (independent contractors retained for debt-collection purposes) whom Congress principally sought to regulate. There is no basis for giving the same term different meanings in the two provisions.

Application of the FDCPA to Ohio's debt-collection special counsel does not intrude on Ohio's sovereignty. The State remains entirely free to use its own officers and employees to collect debts owed to it without triggering the FDCPA's coverage. And if a State retains private independent contractors to assist in those efforts (as Ohio has done), the only consequence is that those contractors must abide by the norms that apply to private debt collectors generally. Petitioners cite no decision of this Court suggesting that application of federal law to a State's independent contractors intrudes on state sovereignty or implicates any clear-statement rule.

II. In addition to its general prohibition of the use of a "false, deceptive, or misleading representation or means in connection with the collection of any debt," 15 U.S.C. 1692e, Section 1692e identifies 16 specific representations or practices as per se violations. Those include false representations that a document was issued by a state official, 15 U.S.C. 1692e(9), and "[t]he use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization," 15 U.S.C. 1692e(14). Because a reasonable jury could conclude that the letters at issue here violated one or both of those prohibitions, the court of appeals correctly reversed the district court's grant of summary judgment for petitioners.

Whether the letters at issue here were false, deceptive, or misleading should be judged from the perspective of an unsophisticated consumer (also referred to as the "least sophisticated consumer"). The Federal Trade Commission took that approach in enforcing the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, before Congress enacted the FDCPA in 1977. Particularly because the FDCPA contains congressional findings that prior laws had been inadequate to protect consumers against abusive debt-collection practices, the FDCPA should not be construed to adopt a standard that is less protective of consumers.

A reasonable jury could conclude that the use of Ohio Attorney General letterhead by debt-collection special counsel violated the FDCPA. Petitioners argue that use of the letterhead was not misleading because it accurately identified the entity (the Office of the Ohio Attorney General) for whom special counsel were performing debt-collection services. The

established function of a letterhead, however, is to identify the *sender* of a communication. Use of Ohio Attorney General letterhead therefore falsely implied that special counsel worked within that government office, when in fact they had been retained as independent contractors. And while petitioners contend that consumers would not care whether dunning letters were sent by a government official or a private contractor, Congress reached a different judgment. The FDCPA specifically prohibits false representations as to the source of debt-collection letters, as well as false representations that a communication was issued by a state official, and the Act draws a fundamental distinction between creditors' use of their own personnel to collect debts and similar efforts by third-party independent contractors.

ARGUMENT

The FDCPA reflects Congress's effort to protect consumers from "debt collection abuse by third party debt collectors." S. Rep. No. 382, 95th Cong., 1st Sess. 2 (1977) (Senate Report). "Unlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts," third-party debt collectors may "have no future contact with the consumer and often are unconcerned with the consumer's opinion of them." *Ibid.* The FDCPA accordingly regulates the debt-collection activities of third-party contractors, but not the efforts of creditors to collect debts owed to themselves.

The FDCPA's fundamental distinction between creditors and third-party debt collectors is crucial to the proper resolution of both questions presented here. Because Ohio special counsel are not part of the State's government, but instead are retained as inde-

pendent contractors, they are subject to the FDCPA's requirements. A reasonable jury could conclude that, by creating the false impression that the letters were sent by public officials, those special counsel violated the Act. The judgment of the court of appeals therefore should be affirmed.

I. OHIO'S DEBT-COLLECTION SPECIAL COUNSEL ARE "DEBT COLLECTOR[S]" SUBJECT TO THE FDCPA'S REQUIREMENTS AND PROHIBITIONS

Subject to enumerated exceptions, the FDCPA defines the term "debt collector" to include any person "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6). Petitioners do not dispute that this language encompasses Ohio debt-collection special counsel. Petitioners rely instead on Section 1692a(6)(C), which states that the term "debt collector" does not include "any officer or employee of * * * any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." 15 U.S.C. 1692a(6)(C). Petitioners are incorrect. Because Ohio's debt-collection special counsel are not part of the state government, but instead are third-party debt collectors hired as independent contractors, they are subject to the FDCPA's requirements and prohibitions.

A. Ohio's Debt-Collection Special Counsel Are Not State "Officer[s]" Within The Meaning Of Section 1692a(6)(C)

1. Although the FDCPA does not define the term "officer," the Dictionary Act states that, "unless the context indicates otherwise," the term "'officer' includes any person authorized by law to perform the

duties of the office." 1 U.S.C. 1. The Dictionary Act does not specify what qualifies as an "office" for purposes of that definition or what it means for a person to be "authorized by law" to perform certain duties. To give meaning and context to those concepts, the Court should look to the common law's definition of public "office" and "officer" because, "[w]here Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Neder* v. *United States*, 527 U.S. 1, 21 (1999) (citations omitted; brackets in original).

2. At common law, courts determined whether an individual was a government officer—as opposed to a government employee or an independent contractor—by examining the nature, quality, and source of the individual's duties and authority. See, *e.g.*, *United States* v. *Germaine*, 99 U.S. (9 Otto) 508, 511 (1879) (examining the "nature of [the individual's] employment" to conclude that "he is not an officer"); *State ex rel. Landis* v. *Board of Comm'rs of Butler Cnty.*, 115 N.E. 919, 919-920 (Ohio 1917) (examining the "quality" and source of the individual's duties to determine that he was not an officer); *State ex rel. Newman* v. *Skinner*, 191 N.E. 127, 128 (Ohio 1934) (same). The term "office" generally "embraces the ideas of tenure, duration, emolument, and duties." *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868); see *Hall* v. *Wisconsin*, 103 (13 Otto) U.S. 5, 9 (1880); *Metcalf & Eddy* v. *Mitchell*, 269 U.S. 514, 520 (1926). The term typically refers to a position that is defined or prescribed by law rather than by contract, *Metcalf & Eddy*, 269 U.S. at 520; with fixed compensation, *Hall*,

103 U.S. (13 Otto) at 9; *Germaine*, 99 U.S. (9 Otto) at 512; and with duties that are permanent and continuing even when the office-holder changes, *Germaine*, 99 U.S. (9 Otto) at 512; see *United States* v. *Maurice*, 26 F Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747) (Marshall, C.J.); *State* v. *Wilson*, 29 Ohio St. 347, 349 (1876).

A leading 19th Century treatise on public officers explained:

> A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.

Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 1, at 1-2 (1890) (Mechem) (footnotes omitted). As the Supreme Court of Maine observed in one influential opinion, "the term 'office' implies a delegation of a portion of the sovereign power to, and possession of it by the person filling the office." *Opinion of the Justices*, 3 Greenl. (Me.) 481, 482 (1822). An individual is considered to exercise a delegated portion of the sovereign power when his authority is granted by law and the exercise of that authority binds third parties or the government without the need for additional authorization by the individual's principal. *Id.* at 482; *State* v. *Jennings*, 49 N.E. 404, 405-406 (Ohio 1898) ("[P]rominence is given to the fact that a public officer is one who exercises, in an independent capacity, a public function, in the interest of the people, by virtue of law, which is only

saying, in another form, that he exercises a portion of the sovereignty of the people delegated to him by law."). This Court explained in *Germaine*, for example, that a "pensions surgeon" was not an officer of the United States because the nature of his duties made him merely the "agent of the [C]ommissioner" of Pensions, appointed "to procure information needed to aid in the performance of [the Commissioner's] own official duties" rather than appointed to carry out his own independent functions. 99 U.S. (9 Otto) at 512.

Common-law courts and relevant secondary sources have frequently contrasted public officers, whose duties are defined and conferred by law, with independent contractors, whose duties are defined and conferred by contract. The Mechem treatise explained that "[a] public office * * * is never conferred by contract, but finds its source and limitations in some act or expression of the governmental power." Mechem § 5, at 5. This Court echoed those sentiments in *Hartwell*, explaining that "[a] government office is different from a government contract," both because "[t]he latter from its nature is necessarily limited in its duration and specific in its objects" and because the contract "terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other." 73 U.S. (6 Wall.) at 393.

The Court in *Metcalf & Eddy* similarly held that consulting engineers were independent contractors, not officers, because "[t]heir duties were prescribed by their contracts and it does not appear to what extent, if at all, they were defined or prescribed by statute." 269 U.S. at 520. Summarizing the characteristics that distinguish an officer from an independent

contractor, Chief Justice Marshall (riding circuit) explained:

> But if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed; it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer.

Maurice, 26 F Cas. at 1214.[1]

3. Under the approach described above, Ohio's debt-collection special counsel are not state officers because they do not hold positions that "embrace[] the ideas of tenure, duration, emolument, and duties." *Hartwell*, 73 U.S. (6 Wall.) at 393.

a. Ohio's debt-collection special counsel serve for a period of time that is established solely by contract and is terminable at the will of the Attorney General. J.A. 171, 185-186. Ohio law leaves the decision whether to appoint any special counsel at all, or whether to replace a special counsel whose contract is terminated, entirely to the discretion of the State's Attorney General. See Ohio Rev. Code Ann. § 109.08 (LexisNexis 2014). The compensation scheme for Ohio special counsel also differs from the "emolument" usually

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[1] Ohio law is to the same effect. See, *e.g.*, *Fuldauer* v. *City of Cleveland*, 290 N.E.2d 546, 551 (Ohio 1972) ("[A] public officer or employee holds his office or position as a matter of law and not of contract."); see also Wilson, 29 Ohio St. at 349 (same); *Board of Comm'rs of Butler Cty.*, 115 N.E. at 919 (same).

associated with government officers because it is established by contract and is not "fixed by law." *Hartwell*, 73 U.S. (6 Wall.) at 393; see *Metcalf & Eddy*, 269 U.S. at 520; *Hall*, 103 U.S. (13 Otto) at 9; see also *Scofield* v. *Strain*, 51 N.E. 1012, 1015 (Ohio 1943). Ohio Revised Code § 109.08 provides that "special counsel shall be paid for their services from funds collected by them in an amount approved by the Attorney General," and the Retention Agreement states that each special counsel will receive defined percentages of the amounts he collects. J.A. 180-183.

b. Ohio's debt-collection special counsel are not "authorized by law to perform the duties of [any] office," 1 U.S.C. 1, and they do not exercise delegated sovereign authority.

The Ohio legislature has authorized the State's Attorney General to "appoint" private lawyers for the purpose of collecting debts owed to the State of Ohio. See Ohio Rev. Code Ann. § 109.08 (LexisNexis 2014); Pet. Br. 27-28; Pet. App. 57a (Sutton, J., dissenting). The term "office," however, has traditionally been understood to "embrace[] the idea of * * * duties fixed by law," and "[t]he term 'officer' is one inseparably connected with an office." *Metcalf & Eddy*, 269 U.S. at 520. A contract for performance of services is not sufficient to create an "office," even when "entered into by authority of law and prescribing [the individuals'] duties." *Ibid.* Where a position "lack[s] * * * the essential elements of a public station, permanent in character, created by law, whose incidents and duties were prescribed by law," the individuals holding the position are "in the position of independent contractors." *Ibid.*

Ohio Revised Code § 109.08 authorizes the State's Attorney General to hire outside attorneys to assist in a particular subset of the duties assigned to the Office of the Attorney General. But the statute does not create an "office of special counsel" and does not specify the range of duties that any particular individual hired as a special counsel is entitled to perform. Nor does it confer governmental authority upon any particular individual hired as a special counsel. Rather, as the court of appeals explained, "Section 109.08 simply establishes the framework under which the Attorney General, within his or her discretion, may delegate the collection of debts to a third-party debt collector." Pet. App. 32a.

c. Even assuming, *arguendo*, that Section 109.08 would have authorized the Ohio Attorney General to take further steps to create positions having the characteristics of government "offices," the Attorney General has not done so. To the contrary, in the Retention Agreement used to hire special counsel, the Attorney General retains complete discretion to decide which debts, if any, a particular special counsel may pursue. J.A. 171, 173-174. Special counsel are not authorized to settle any claim or to initiate litigation on behalf of the State with respect to any claim without first obtaining "the prior approval of the Attorney General." J.A. 179.

The Retention Agreement specifies, moreover, that "Special Counsel will render services pursuant to this appointment as an independent contractor. No Special Counsel, whether for purpose of applications of Ohio Revised Code Chapter 102, R.C. 9.86 or 9.07 or for any other purpose, shall be regarded as in the employment of, or as an employee of, the Attorney

General or the State Clients." J.A. 173. The Ohio Revised Code provisions that the Retention Agreement declares to be inapplicable address indemnification of state officers and employees. Rather than providing that the State will indemnify special counsel, the contract requires special counsel to indemnify the Attorney General and the State of Ohio for "any and all claims for injury or damages arising from this Retention Agreement that are attributable to Special Counsel's own actions." J.A. 190. The Retention Agreement thus reflects the Attorney General's clear intent to *disclaim* any inference that appointed special counsel are part of the State's government.

Special counsel are similar to the "pensions surgeons" that the Court in *Germaine* found not to be officers. 99 U.S. (9 Otto) at 511-512. Like Ohio Revised Code § 109.08, a federal statute authorized a government officer (the Commissioner of Pensions) "to appoint" pensions surgeons to perform certain tasks delegated to the surgeons at the principal's discretion. 99 U.S. (9 Otto) at 508 (citing Act of Mar. 3, 1873, ch. 234, § 35, 17 Stat. 576). The Commissioner of Pensions, like the Ohio Attorney General, was authorized to "appoint one or a dozen persons to do the same thing." *Id.* at 512. And like Ohio's debt-collection special counsel, the pensions surgeon in *Germaine* had duties that were "occasional and intermittent" and were designed "to aid in the performance of [the principal's] own official duties." *Ibid.*

Ohio's debt-collection special counsel also have been delegated no portion of Ohio's sovereignty. They are not authorized by law, or even by contract, to undertake any independent action that will bind a third party, the Ohio Attorney General, or the State of

Ohio. See, *e.g.*, Mechem § 4, at 5; *Opinion of the Justices*, 3 Greenl. (Me.) at 482; *Germaine*, 99 U.S. (9 Otto) at 512; p. 18, *supra*. As explained above, special counsel must confer with the Attorney General's office and "receive the prior approval of the Attorney General" before settling any claim or initiating litigation. J.A. 179. Although special counsel undoubtedly assist the Office of the Attorney General in pursuing debts owed to the State, they do not exercise any sovereign authority in doing so and therefore cannot properly be considered "officers."[2]

B. The Structure And Purposes Of The FDCPA Confirm That Ohio's Special Counsel Are Not State "Officers" Within The Meaning Of Section 1692a(6)(C)

Petitioners identify no sound reason to construe the term "officer" in Section 1692a(6)(C) as sweeping

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[2] A different analysis may sometimes be required to determine whether an individual is excluded from the FDCPA's definition of "debt collector" as an "employee" of the creditor. Staff of the FTC previously stated that the creditor "employee[s]" excluded under Section 1692e(6)(A) could include a "*de facto* employee" who "works for a creditor to collect in the creditor's name at the creditor's office under the creditor's supervision." 53 Fed. Reg. 50,097, 50,102 (Dec. 13, 1988). In a subsequent letter, FTC staff stated that the "*de facto* employee" concept does not "encompass broader categories, such as the creditor's representatives or agents," but only those collection-agency employees who are "treated essentially the same as creditor employees." Letter from Thomas E. Kane, Attorney, Division of Financial Practices, FTC, to Richard T. de Mayo, Esq. (May 23, 2002), at 2-3. The CFPB, which is the first agency with general rulemaking authority under the FDCPA, has not addressed this rationale. No question concerning the proper application of the "de facto employee" concept is presented here, because petitioners do not argue that Ohio's debt-collection special counsel are "employee[s]" of the State within the meaning of Section 1692a(6)(C).

beyond the established common-law understanding to encompass individuals, like Ohio special counsel, who are retained as independent contractors rather than made part of the state government. To the contrary, the FDCPA's structure and purposes reinforce the conclusion that such independent contractors are not state "officer[s]" within the meaning of Section 1692a(6)(C).

The distinction between a creditor's use of in-house personnel to collect debts and its hiring of third-party debt collectors is fundamental to the FDCPA's operation. In addition to the exemption for state officers and employees that is at issue in this case, a separate provision exempts from the FDCPA's coverage "any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor." 15 U.S.C. 1692a(6)(A). That provision ensures that private creditors, like state governments, can use their own personnel to collect debts owed to them without becoming subject to the FDCPA.

A reading of Section 1692a(6)(A) that encompassed debt collectors retained as independent contractors would wholly subvert Congress's purposes. If such contractors were treated as "officers" of a private creditor, simply because they had been retained by the creditor to assist in its debt-collection activities, Section 1692a(6)(A) would exempt from the FDCPA's coverage the very persons whom Congress primarily sought to regulate. See Senate Report 3 ("The primary persons intended to be covered [by the Act] are independent debt collectors."); see *id.* at 2 ("The committee has found that debt collection abuse by third party debt collectors is a widespread and serious national problem.").

Petitioners' argument thus depends on the view that, although Congress used the phrase "officer or employee" in both Section 1692a(6)(A) and Section 1692a(6)(C), it intended the word "officer" to encompass independent contractors in the second provision but not in the first. That approach flouts bedrock principles of statutory construction. "Generally, 'identical words used in different parts of the same statute are presumed to have the same meaning.'" *Robers* v. *United States*, 134 S. Ct. 1854, 1857 (2014) (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 86 (2006)). That interpretive canon has particular force here, because the two provisions appear close together within a list of exemptions from the FDCPA's definition of "debt collector."

If Congress had wished to adopt the broad exemption that petitioners advocate, it could easily have drafted Section 1692a(6)(C) to encompass "any person authorized to collect a debt owed to a State or state agency." Congress's decision instead to use in Section 1692a(6)(C) the same phrase ("officer or employee") that it used in Section 1692a(6)(A) makes clear that Congress intended the collection of debts owed to States to be subject to the same basic FDCPA regime that governs collection of debts owed to private creditors. Both private and governmental creditors may use in-house personnel to collect debts without triggering the Act's coverage. But when either type of creditor elects to hire an outside attorney to engage in debt collection as an independent contractor, those contractors must comply with the Act.

C. Application Of The FDCPA To Ohio's Debt-Collection Special Counsel Does Not Intrude On Ohio's Sovereign Interests

Petitioners argue (Br. 1-3, 19-22, 27-30) that Ohio's debt-collection special counsel should be treated as state "officer[s]" within the meaning of Section 1692a(6)(C) to avoid impairment of the State's sovereign function of collecting money owed to it. See Pet. App. 58a (Sutton, J., dissenting) ("Special counsel [are] hired to perform core sovereign functions" "concerning the People's money."). The collection of debts owed to a State is undoubtedly essential to the State's financial soundness and thus to its effective operations. Petitioners identify no sound basis for concluding, however, that application of the FDCPA to Ohio special counsel will impede that function or otherwise impair the State's sovereign dignity.

Petitioners argue (Br. 24, 34) that States have a sovereign interest in determining their structure of government and the appropriate division of authority within that structure. But the FDCPA leaves the States entirely free to designate their own officers and employees to collect debts owed to them. If a State chooses that approach, the FDCPA is inapplicable to its collection efforts. Provisions like Section 1692a(6)(C), which exempts state officers and employees from the FDCPA, are a traditional means by which Congress seeks to preserve intergovernmental comity and to avoid unnecessary interference with the operation of state governments.

The FDCPA likewise leaves Ohio free to contract with persons outside the government for assistance in collecting debts owed to the State. The consequence of that decision, however, is that those private con-

tractors (although not the State itself) may be held liable under the FDCPA if they violate the norms that apply to private third-party debt collectors generally. The Retention Agreement between the Ohio Attorney General and special counsel directs that "Special Counsel must comply with the same standards of behavior as set forth in," *inter alia*, the FDCPA. J.A. 194. Thus, while the Ohio Attorney General opposes a legal rule that would subject special counsel to *liability* under the FDCPA, he evidently does not view the Act's substantive requirements as inconsistent with effective debt collection. More fundamentally, petitioners cite no decision of this Court suggesting that application of federal law to a State's independent contractors intrudes on state sovereignty or triggers any clear-statement rule.

Petitioners' reliance (Br. 24, 30) on *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), is particularly misplaced. *Gregory* presented the question whether the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, overrode a Missouri constitutional provision that imposed a mandatory retirement age on the justices of its state supreme court. 501 U.S. at 455. The Court observed that the policy judgment reflected in the Missouri retirement-age provision was "a decision of the most fundamental sort for a sovereign entity" because "[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Id.* at 460. Absent an unambiguous statement of congressional intent to countermand the State's judgment, the Court declined to read the ADEA to dictate that result. *Id.* at 460-467.

In this case, by contrast, Ohio officials have declared debt-collection special counsel to be independent contractors, and the State has chosen *not* to vest those special counsel with governmental power. Nothing in *Gregory* suggests that application of the FDCPA is disfavored in these circumstances simply because Ohio special counsel provide useful practical assistance in the performance of an important state function. In that regard, special counsel are not meaningfully different from many other individuals (*e.g.*, truck drivers or construction workers) who are employed by private companies but occasionally perform work pursuant to contracts with the State. Application of federal law to such persons has not traditionally been thought to impair state sovereign prerogatives.

Petitioners' emphasis on the State's sovereign interest in collecting debts owed to it is flawed in another respect as well. Section 1692a(6)(C) exempts from the FDCPA's definition of "debt collector" any state officer or employee "to the extent that collecting or attempting to collect any debt is in the performance of his official duties." Although Section 1692a(6)(C) encompasses state officers and employees who collect debts owed to the State itself, it is not limited to such persons. Rather, Section 1692a(6)(C) also exempts from the FDCPA's definition of "debt collector" any state officer or employee who is tasked by state law with collecting debts owed to private persons. Cf. Senate Report 3 (noting that Congress did not intend the FDCPA to cover "marshals and sheriffs, while in the conduct of their official duty" or "process servers"). That aspect of Section 1692a(6)(C) highlights Congress's decision to make the exemption turn on an

individual's status as a state "officer or employee"—*i.e.*, as part of the state government—rather than on the identity of the creditor to whom the debt is owed.

II. A REASONABLE JURY COULD CONCLUDE THAT OHIO'S DEBT-COLLECTION SPECIAL COUNSEL VIOLATED THE FDCPA BY USING THE LETTERHEAD OF THE OFFICE OF THE ATTORNEY GENERAL

Petitioners argue that, as a matter of law, the use by Ohio's debt-collection special counsel of the Ohio Attorney General's letterhead in communications with debtors cannot constitute a violation of the FDCPA. The court of appeals correctly rejected that contention.

The FDCPA provides, *inter alia*, that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. 1692e. In addition to that general prohibition, Section 1692e includes a non-exhaustive list of 16 specific representations or practices that are per se violations. Two such practices are relevant here:

> (9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization or approval.
>
> * * *
>
> (14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

15 U.S.C. 1692e(9) and (14). In light of Section 1692e's general and specific prohibitions, the court of appeals correctly held that a reasonable jury could find the use by Ohio's debt-collection special counsel of letterhead from the Office of the Attorney General to be a violation of the FDCPA.

A. Whether A Debt-Collection Practice Is False, Deceptive, Or Misleading Should Be Judged From The Perspective Of An Unsophisticated Consumer

The FDCPA does not specify from whose perspective a judge or jury should assess whether a particular debt-collection practice is deceptive, is misleading, or creates a false impression. Every court of appeals to consider the question has adopted an "unsophisticated consumer" test (also known as a "least sophisticated consumer" test). *Pollard* v. *Law Office of Mandy L. Spaulding*, 766 F.3d 98, 103 & n.4 (1st Cir. 2014); *Eades* v. *Kennedy, PC Law Offices*, 799 F.3d 161, 173 (2d Cir. 2015); *Jensen* v. *Pressler & Pressler*, 791 F.3d 413, 418 (3d Cir. 2015); *Russell* v. *Absolute Collection Servs., Inc.*, 763 F.3d 385, 395 (4th Cir. 2014); *Goswami* v. *American Collections Enter., Inc.*, 377 F.3d 488, 495 (5th Cir. 2004), cert. denied, 546 U.S. 811 (2005); Pet. App. 46a-48a; *Gammon* v. *GC Servs. Ltd. P'ship*, 27 F.3d 1254, 1257 (7th Cir. 1994); *Peters* v. *General Serv. Bureau, Inc.*, 277 F.3d 1051, 1055 (8th Cir. 2002); *Donohoe* v. *Quick Collect, Inc.*, 592 F.3d 1027, 1033 (9th Cir. 2010); *Fouts* v. *Express Recovery Servs., Inc.*, 602 Fed. Appx. 417, 421 (10th Cir. 2015); *Miljkovic* v. *Shafritz & Dinkin, P.A.*, 791 F.3d 1291, 1306 (11th Cir. 2015).[3]

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[3] Courts of appeals agree that there is no practical difference between the "unsophisticated consumer" and "least sophisticated

Petitioners urge the Court to adopt a test that would examine debt-collection practices from the perspective of "the average consumer who has defaulted on a debt." Br. 41. Petitioners do not explain how, as a practical matter, such a test would differ from an unsophisticated-consumer test. No court of appeals has adopted petitioners' formulation, and there is no reason for this Court to do so. Rather, the established focus on the likely reactions of reasonable but unsophisticated consumers best serves the intent of the Congress that enacted the FDCPA.

Before the FDCPA's enactment in 1977, the Federal Trade Commission (FTC or Commission) monitored debt collectors under Section 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45, which prohibits unfair or deceptive acts or practices in or affecting commerce. By the time the FDCPA was enacted, the Commission had recognized that its "duty" under the FTC Act was "to protect the 'gullible and credulous as well as the cautious and knowledgeable.'" *In re Slough*, 70 F.T.C. 1318, 1355 (1966) (citation omitted), enforced, *Slough* v. *FTC*, 396 F.2d 870 (5th Cir. 1968), cert. denied, 393 U.S. 980 (1968). In upholding an FTC finding that an advertising practice was unfair, false, and misleading, this Court admonished that "[l]aws are made to protect the trusting as well as the suspicious." *FTC* v. *Standard Educ. Soc'y*, 302 U.S. 112, 116 (1937). Lower courts reviewing similar FTC findings held that, "[i]n evaluating the tendency of language to deceive, the Commission should look not to the most sophisticated readers but rather to the least." *Exposition Press, Inc.* v. *FTC*,

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consumer" standards. See, *e.g.*, *Pollard*, 766 F.3d at 103 n.4; *Jensen*, 791 F.3d at 419 n.3.

295 F.2d 869, 872 (2d Cir. 1961), cert. denied, 370 U.S. 917 (1962).

The FDCPA contains congressional findings that "[e]xisting laws and procedures for redressing * * * injuries" caused by "abusive, deceptive, and unfair debt collection practices" were "inadequate to protect consumers." 15 U.S.C. 1692(a) and (b). Based in part on those statutory findings, courts of appeals have correctly inferred that Congress did not intend to adopt an FDCPA standard less protective of consumers than the standard previously applied under the FTC Act. *Jeter* v. *Credit Bureau, Inc.*, 760 F.2d 1168, 1173-1174 (11th Cir. 1985) ("It would be anomalous for the Congress, in light of its belief that existing state and federal law was inadequate to protect consumers, to have intended that the legal standard under the FDCPA be *less* protective of consumers than under the existing 'inadequate' legislation."); see *Baker* v. *G.C. Servs. Corp.*, 677 F.2d 775, 778 (9th Cir. 1982) (adopting least-sophisticated-consumer standard from FTC's analysis of deceptive-advertising claims).

As applied by courts of appeals in FDCPA cases, the unsophisticated-consumer standard is an objective standard that incorporates an element of reasonableness. The standard is designed to protect "'consumers of below-average sophistication or intelligence' who are 'especially vulnerable to fraudulent schemes,'" *Gammon*, 27 F.3d at 1257 (quoting *Clomon* v. *Jackson*, 988 F.2d 1314, 1319 (2d Cir. 1993)), but it "prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness and presuming a basic level of understanding and willingness to read with care," *Wilson* v. *Quadramed Corp.*, 225 F.3d 350, 354-355 (3d

Cir. 2000) (citation omitted). Courts thus consider whether a hypothetical unsophisticated consumer who is not inclined to bizarre or idiosyncratic interpretations would be confused or misled by a debt collector's communication. *McKinney* v. *Cadleway Props., Inc.*, 548 F.3d 496, 503 (7th Cir. 2008); see *McMahon* v. *LVNV Funding, LLC*, 744 F.3d 1010, 1019 (7th Cir. 2014) (considering perspective of person of modest education and limited commercial savvy).

B. Because A Reasonable Jury Could Find That Ohio's Debt-Collection Special Counsel Violated The FDCPA, The Court Of Appeals Correctly Reversed The District Court's Award Of Summary Judgment For Petitioners

Like any standard that refers to a reasonable person or a reasonable consumer, the "reasonable unsophisticated consumer" standard is suitable for application by a properly instructed jury (or by a judge as factfinder in a bench trial). See *Hana Fin., Inc.* v. *Hana Bank*, 135 S. Ct. 907, 911 (2015). In this case, petitioners and respondents both argued to the court of appeals that they were entitled to summary judgment on respondents' claim that an unsophisticated consumer would be misled by special counsel's use of the Attorney General's letterhead. The court rejected both arguments, holding instead that a jury should decide whether special counsel's use of the letterhead violated the FDCPA. Pet. App. 54a. Because respondents did not file a petition or cross-petition for a writ of certiorari, the only question before this Court is whether the court of appeals erred in denying petitioners' request for entry of summary judgment. The

court of appeals' ruling on that question should be affirmed.[4]

1. The FDCPA prohibits "[t]he use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization." 15 U.S.C. 1692e(14). Although that prohibition is not limited to circumstances where a third-party debt collector misrepresents itself to be the creditor, it has particular salience in that context. A third-party debt collector is subject to the FDCPA's requirements precisely *because he is not the creditor.* But while that distinction is fundamental to the FDCPA, it can be confusing for the debtor. Although the consumer typically has a pre-existing relationship with the original creditor, he is unlikely to know or be familiar with a third-party debt collector. To minimize the possibility of confusion, Congress not only prohibited misrepresentations as to source, but affirmatively required debt collectors to disclose in *every* communication with a debtor "that the communication is from a debt collector." 15 U.S.C. 1692e(11).

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[4] Some circuits have suggested that the district court can always determine, as a matter of law, whether particular language in a debt-collection letter violates the FDCPA. See, *e.g.*, *Wilson*, 225 F.3d at 353 n.2. That is incorrect. This Court "ha[s] long recognized across a variety of doctrinal contexts that, when the relevant question is how an ordinary person or community would make an assessment, the jury is generally the decisionmaker that ought to provide the fact-intensive answer." *Hana Fin.*, 135 S. Ct. at 911. Even when a jury trial has been requested, however, the district court may determine, on a motion for summary judgment or for judgment as a matter of law, whether a reasonable jury could find for the non-moving party on the question whether a particular communication violates Section 1692e. See *ibid.*

Of course, a debt collector's communication may include the name of its client to the extent it identifies for the debtor "the name of the creditor to whom the debt is owed." 15 U.S.C. 1692g(a)(2) (requiring debt collector to inform the consumer of the name of the creditor in the debt collector's initial communication with the consumer). But a debt collector's use of the creditor's name to suggest that the creditor is the actual sender of the letter is prohibited by Section 1692e(14).[5] Blurring the line between sender and represented party is especially problematic when the creditor is a government entity because Section 1692e(9) separately prohibits the use of any communication that falsely suggests that the communication was "issued * * * by any * * * official * * * of * * * any State." 15 U.S.C. 1692e(9).

2. Petitioners principally argue (Br. 46) that special counsel's use of the Attorney General's letterhead accurately conveyed that the letters were "sent on behalf of the organization identified (the Attorney General's Office) by the individuals listed in the signature block (special counsel)." That argument rests on the premise that, when the sender of a letter acts in a representative capacity, the accepted function of a letterhead is to identify the organization "on behalf of" which the letter is sent—*i.e.*, the client rather than the representative. That is not so. By convention, the established function of a letterhead is to identify the *sender* of the letter. When a communication uses the letterhead of an office or organization (including a law firm), it implies that the individual sender of the letter

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[5] Conversely, 15 U.S.C. 1692j makes it unlawful for a creditor to give a consumer the false impression that the creditor has hired a third-party debt collector.

is a member or employee of the organization, not that the individual has been retained as an outside contractor to represent the organization.

Petitioners are also wrong in arguing (Br. 47) that, notwithstanding special counsel's use of the Ohio Attorney General's letterhead, the name of the special counsel in the signature block dispels any possible misconception about the sender's identity and status. Petitioner Jones's letter identified him as "Outside Counsel for the Attorney General's Office," Pet. App. 14a, and petitioner Sarah Sheriff's letter identified her (incorrectly) as "Special Counsel for the Attorney General for the State of Ohio," *id.* at 17a. Neither letter states explicitly that the sender is a third-party independent contractor rather than a government officer or employee, and there is no basis for assuming that a reasonable unsophisticated consumer would understand the terms "Outside Counsel" and "Special Counsel" to dispel the inference that the Ohio Attorney General letterhead would otherwise create.

Indeed, petitioners have argued throughout this litigation, including in this Court, that debt-collection special counsel *are* "officers" of the State of Ohio, at least for purposes of Section 1692a(6)(C). It therefore is unsurprising that the letters sent by special counsel conveyed that impression. At a minimum, a reasonable jury could conclude, based on its assessment of the inferences that a reasonable unsophisticated consumer could draw, that the letters violated Section 1692(e)(9) and/or Section 1692(e)(14).

3. Petitioners argue that Section 1692e contains a "materiality element" such that the provision bars only communications "concern[ing] matters that could affect a debtor's decisionmaking." Br. 43; see Br. 43-

44. As explained above, Section 1692e contains a non-exhaustive list of 16 types of false representations or omissions that constitute violations of that provision. To determine whether a particular communication violates one of those prohibitions, a jury or judge must assess how a reasonable unsophisticated consumer would *understand* the communication—not what actions the consumer would likely take in response. To be sure, the enumeration of those categories presumably reflects the enacting Congress's belief that, as a general matter, the prohibited practices have a natural tendency to influence debtors' decisionmaking. If a particular communication is determined to fall within one of the enumerated categories, however, the statute does not contemplate any further inquiry into the likelihood that the specific communication would alter any decision of either the actual recipient or the reasonable unsophisticated consumer.

Petitioners suggest (Br. 51) that it does not "matter to consumers" whether letters like those at issue here are sent by state officials or by independent contractors. Congress, however, has made a different judgment, because the FDCPA specifically prohibits false representations as to the source of dunning letters, as well as false representations that a communication was issued by a state official. Those prohibitions appear, moreover, within a statute that draws a fundamental distinction between creditors' efforts to collect debts through their *own* personnel and creditors' use of independent contractors as third-party debt collectors. Because petitioners' letters could have given a reasonable unsophisticated consumer the false impression that the letters were sent by the Office of the Ohio Attorney General, the court of ap-

peals correctly reversed the district court's award of summary judgment for petitioners.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 15 U.S.C. 1692 provides:

Congressional findings and declaration of purpose

(a) Abusive practices

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of laws

Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods

Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Interstate commerce

Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes

It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

2. 15 U.S.C. 1692a provides in pertinent part:

Definitions

As used in this subchapter—

* * * * *

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) or this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The terms does not include—

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a se-

cured party in a commercial credit transaction involving the creditor.

* * * * *

3. 15 U.S.C. 1692e provides:

False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of—

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages

of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer or any interest in a debt shall cause the consumer to—

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

4. 15 U.S.C. 1692j provides:

Furnishing certain deceptive forms

(a) It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating.

(b) Any person who violates this section shall be liable to the same extent and in the same manner as a debt collector is liable under section 1692k of this title for failure to comply with a provision of this subchapter.

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IN THE

Supreme Court of the United States

MARK J. SHERIFF, SARAH SHERIFF, WILES, BOYLE, BURKHOLDER & BRINGARDNER CO., LPA, AND MICHAEL DEWINE, ATTORNEY GENERAL OF OHIO,
Petitioners,

v.

PAMELA GILLIE AND HAZEL MEADOWS,
Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR AARP AS AMICUS CURIAE SUPPORTING RESPONDENTS

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STATEMENT OF INTEREST[1]

Many older people are vulnerable to the serious and lasting impact of abusive, deceptive, and unfair debt collection practices, which may leave them without sufficient resources to pay for basic necessities such as food, shelter, and medical care. AARP is a nonpartisan, nonprofit organization with a membership dedicated to addressing the needs and interests of people age 50 and older.

AARP has a strong interest in participating as amicus curiae in this case. It has the potential to eliminate an important protection against abusive, deceptive, and otherwise unfair debt collection practices by third-party debt collectors, whom Congress has found have a strong financial incentive to collect debts by any means. Having been hired by the state does not alter this incentive. They may or may not use abusive—or even egregious—practices, such as false threats of prosecution or taking one's home or Social Security payments. The protection provided by the FDCPA is essentially the only protection vulnerable consumers have to stop such abuses. AARP's participation in this case will assist the Court in understanding the vulnerability of older people to abusive, deceptive, or unfair debt collection practices and that protecting these vulnerable

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[1] No counsel for a party authored any part of this brief and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. Only AARP or their attorneys have paid for the filing and submission of this brief. Pursuant to Rule 37.3(a), all parties consented to the filing of this brief. Letters by all parties consenting to AARP filing a brief amicus curiae are being filed with the Court.

debtors does not unduly limit states from collecting debts.

SUMMARY OF THE ARGUMENT

Congress enacted the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.*, to protect financially vulnerable and unsophisticated consumers from the practices of a necessary but abuse-ridden industry. It found "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). Put simply, the use of abusive, deceptive or unfair collection practices is not justified just because a consumer owes a debt. Congress debunked the myth that all debtors are deadbeats who are capable of paying their bills but willfully refuse to do so or who incur debt without the intention of paying. S. Rep. No. 95-382, at 3, reprinted in 1977 U.S.C.C.A.N. 1695, 1696 (finding that consumers often are subject to collections due to an "unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce").

The debt collection industry has changed and grown dramatically since the FDCPA was enacted. Unfortunately, abusive, deceptive, and unfair debt collection practices continue to plague vulnerable consumers. Debt collection is the leading source of consumer complaints to the Consumer Financial Protection Bureau (CFPB). Consumer Fin. Prot. Bureau, Annual Report 2015: Fair Debt Collection Practices Act (2015) [hereinafter CFPB 2015 Annual

Report], http://1.usa.gov/1QYTr8l (reporting approximately 88,300 consumer complaints in 2014).

Many older people are particularly vulnerable to debt collection abuses. Increasingly, they are nearing their retirement years saddled with unaffordable debt loads, lagging income, and rising costs for medical care, housing, and other necessities. Heather C. McGhee & Tamara Draut, *Retiring In The Red: The Growth Of Debt Among Older Americans* 2, Dēmos, (2004) http://bit.ly/1XVvLHd. Nearing their retirement years, older people "can't rely on raises or job-hopping for better pay to help dig them out." Michelle Singletary, *Be attuned to seniors who carry a burden of debt*, The Washington Post (Feb. 9, 2016), http://wapo.st/1RXMB7M. And the value of their assets was decimated during the Great Recession, or depleted to cover long periods of unemployment. *See* Amy Traub, *In the Red: Older Americans and Credit Card Debt* 3-4, AARP Pub. Pol'y Inst. Middle Class Security Project (Jan. 2013), http://bit.ly/1KHjww0.

This Court should affirm the Sixth Circuit's decision. *See Gillie v. Law Office of Eric A. Jones, LLC*, 785 F.3d 1091, 1101-1102 (6th Cir. 2015), *cert. granted sub nom Sheriff v. Gillie*, 193 L. Ed. 495 (U.S. Dec. 12, 2015) (No. 15-338). A narrow construction of the "state officer" exception to the definition of "debt collector" preserves the FDCPA's remedial purpose of protecting vulnerable consumers from abusive, deceptive, or otherwise unfair treatment by third-party debt collectors. The interpretation advocated by Petitioners will prevent

consumers from challenging explicitly prohibited abuses—regardless of how egregious—that may be committed by participants of the industry that Congress enacted the FDCPA to police.

Requiring third-party debt collectors hired by a state to comply with the minimal national standard of conduct Congress established when it enacted the FDCPA does not prevent states from outsourcing collection of consumer debt owed to a state. It only requires any such collectors to use "[m]eans other than misrepresentation or other abusive debt collection practices [that] are available for the effective collection of debts." 15 U.S.C. § 1692(c).

AARP urges this Court to affirm the decision of the Sixth Circuit.

ARGUMENT

I. CONSUMERS NEED PROTECTION FROM ABUSIVE, DECEPTIVE, AND UNFAIR COLLECTION PRACTICES USED BY THIRD-PARTY DEBT COLLECTORS TO EXPLOIT FINANCIAL, EDUCATIONAL, AND CIRCUMSTANTIAL VULNERABILITIES OF DEBTORS.

The debt collection industry has grown into "a $13 billion dollar industry. Around 35 percent of adults, or 77 million of the 220 million Americans with credit files, show debts in collections." CFPB 2015 Annual Report, *supra*, at 7. Not surprisingly,

"debt collectors generate most of their revenue from collections of medical debt, student loans, and financial services obligations such as credit cards, auto loans, and mortgages." *Id.*

The sheer amount of consumer debt in collection makes it one of the most important consumer protection concerns in the nation:

> Whether or not consumers owe and are liable for the debts collectors are attempting to recover, unlawful collection practices can cause significant reputational damage, invade personal privacy, [ ] inflict emotional distress[,] interfere[] with a consumer's employment relationships [and] impair the consumer's ability to repay debts.

Defining Larger Participants of the Consumer Debt Collection Market, 77 Fed. Reg. 65775-01, 65777 (Oct. 31, 2012) (to be codified at 12 C.F.R. pt. 1090). Indeed, "[i]n 2014, the CFPB and the FTC provided almost $700 million in relief to consumers who were subject to illegal collections practices; the CFPB collected $13 million in fines, and took seven enforcement actions involving egregious debt collection violations; the FTC's enforcement actions resulted in 47 businesses and individuals being banned from the debt collection business." CFPB 2015 Annual Report, *supra*, at 3.

"Today's collection industry is markedly different from the industry contemplated by the

FDCPA 35 years ago." Consumer Fin. Prot. Bureau, Annual Report 2012: Fair Debt Collection Practices Act 4 (2012), http://1.usa.gov/1PWCGNh (explaining the industry has been revolutionized by automation, technological advances, and new key players, including attorneys). "But, even as the industry has changed, abuses remain an issue. The collection industry continues to be a top source of complaints." *Id.*; *see also* Fed. Trade Comm'n, The Structure and Practices of the Debt Buying Industry i (2013), http://1.usa.gov/1R7Ov0O (same).

Complaints to the CFPB about debt collection abuses outnumber complaints about any other industry, product or service. Consumers lodged approximately 88,300 such complaints in 2014. CFPB 2015 Annual Report, *supra* at 12-13. Of those complaints, 37 percent reported they did not owe the debt being collected because it: did not belong to them (64 percent); had been paid already (26 percent); resulted from identity theft (6 percent); or had been discharged in bankruptcy (4 percent). *Id.* at 13. An additional 5 percent of complaints reported that consumers were being pursued for greater amounts of debt than they owed. *Id.* at 15. Communication tactics were the source of 20 percent of the complaints. *Id.* at 14. In 12 percent of the complaints, consumers reported abusive debt collection tactics, including threats to arrest or jail consumers if they did not pay, seizure or attempts to seize property, and collection or attempts to collect exempt funds. *Id.* at 14-15.

Many older people are living in financially precarious situations: they have growing debt loads,

lagging income, and depleted assets in the aftermath of the economic recession. *See* Traub, *supra* at 3-4; *see also* Meta Brown, *The Graying of American Debt*, Fed. Res. Bank of N.Y. (Feb. 12, 2016), http://nyfed.org/1Qnxxz9 (showing that the debt of Americans age 50 to 80 increased 59% since 2013). Such consumers are particularly vulnerable to debt collection abuses. *See* Consumer Fin. Prot. Bureau, Office for Older Americans, A snapshot of debt collection complaints submitted by older consumers 5-6 (2014), http://1.usa.gov/1KQeWeW Fully one third of all complaints by people over age 62 relate to debt collection. *Id.* (reporting that "[b]etween July 10, 2013 and September 30, 2014, the CFPB handled approximately 25,800 complaints from older consumers [o]ver one-third of those complaints were about debt collection.").

Collecting consumer debts using practices prohibited by the FDCPA exacerbates the suffering of vulnerable consumers, causing serious distress and depriving many of necessities basic to human survival, such as food, shelter, and medical care.

A. Increasing complaints about abusive debt collection practices corresponds to mounting consumer debt loads.

Congress sought to protect consumers from debt collection abuses specifically because it recognized that debtors facing collection are rarely "deadbeats." As the FDCPA's legislative history reveals,

> [o]ne of the most frequent fallacies concerning debt collection legislation is the contention that the primary beneficiaries are "deadbeats." In fact, however, there is universal agreement among scholars, law enforcement officials, and even debt collectors that the number of persons who willfully refuse to pay just debts is minuscule the vast majority of consumers who obtain credit fully intend to repay their debts. When default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce.

S. Rep. No. 95-382, at 3. Such unforeseen events continue to be the primary precipitating cause of default. *See Older Adults and Debt: Trends, Trade-offs, and Tools to Help* 1, National Council on Aging (May 2015) [hereinafter National Council on Aging Report], http://bit.ly/1XJ6lfN (explaining "unexpected costs—an unforseen hosipitalization, a vehicle requiring repair, or even emergency veterinary care for a sick pet—can plunge seniors into unmanageable debt").

The steadily growing volume of complaints about debt collection abuses correspond to a period of steep expansion of credit followed by a sharp economic downturn. *See* CFPB 2015 Annual Report, *supra*, at 7-8. At the beginning of 1977—the year the FDCPA was enacted—consumers carried revolving debt worth approximately $32 billion. Bd. of Governors of the Fed. Res., *Consumer Credit*

Outstanding, http://1.usa.gov/1T2w8AP By 2015, revolving debt increased more than 29 times to $935 billion. Bd. of Governors of the Fed. Res., *Statistical Release: Consumer Credit* (Feb. 5, 2016), http://1.usa.gov/1XJ7rs1.

Student loan debt has also increased dramatically; "the volume of outstanding federal student loan debt has more than doubled, rising from $516 billion in 2007 to greater than $1.2 trillion in the third quarter of 2015, surpassing all other categories of consumer debt aside from mortgages." Consumer Fin. Prot. Bureau, Student Loan Servicing: Analysis of public input and recommendations for reform 8 (2015), http://1.usa.gov/1TDQa4a (reporting "[m]ore than 41 million Americans collectively owe more than $1.2 trillion in student loan debt"). The CFPB estimates that "a quarter of student loan borrowers are, collectively. either delinquent or in default on more than $175 billion in student debt." *Id.* at 9. That subset is comprised primarily of "borrowers who attend proprietary schools and borrowers who do not successfully complete a program of study." *Id.* at 9-10.

Not only do more Americans carry more debt than ever before, but more people have debt that is unaffordable (i.e., the minimum payments consume more than 40 percent of their income). Craig Copeland, *Debt of the Elderly and Near Elderly, 1992–2013*, Employee Benefit Research Institute Notes, Vol. 36, No. 1, 10 (Jan. 2015), http://bit.ly/1QYh1SG (explaining that "a traditional threshold measure of debt-load trouble" is debt

payments that consume 40 percent of one's income). The increasing consumer debt load is especially acute for older age groups: the proportion of near-elderly (age 55-64) and elderly families (age 65 and over) with unaffordable debt loads increased from 5.8 percent in 1992 to 9.2 percent in 2013. *Id.* at 7

Debt load has increased, in part, because income is not keeping pace with rising costs, forcing people to borrow simply to pay for necessities such as shelter, food, and medical expenses.[2] *Id. See also*

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[2] Abusive credit origination and billing practices also contributed significantly to the increased debt load carried by older people. *See* Donna S. Harkness, *When Over-The-Limit is Over The Top: Addressing The Adverse Impact of Unconscionable Consumer-Credit Practices on the Elderly*, 16 Elder L.J. 1, 9-11 (2008). Many consumers were lured into opening accounts that unbeknownst to them charged high interest, fees, and penalties even if they were making minimum required payments. *See* U.S. Gov't Accountability Office, GAO-06-929, Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers 16 (2006). http://1.usa.gov/1RjoYnT. Despite paying their minimum balances every month and not making additional purchases, the balances on many credit card accounts increased substantially over time. The products were designed to generate revenue from penalty fees and consumer default and rather than repayment. *See* Examining The Billing, Marketing, And Disclosure Practices Of The Credit Card Industry And Their Impact On Consumers, Before the S. Comm. on Banking, Housing & Urban Affairs, 110th Cong. 3 (Jan. 25, 2007) (statement of Prof. Elizabeth Warren) (testifying that such credit and billing practices meant that "[a] debtor could pay nearly 100 percent of what she owed every year for the rest of her life, and thanks to the traps built in to her credit card, she would keep paying until she died—and still not pay off her card."). Congress passed the Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. 111-24, Title

Ke Bin Wu, *Sources of Income for Older Americans, 2012* AARP Pub. Pol'y Inst. 1 (Dec. 2013) (reporting "[i]n 2012, people aged 65 and older had an average (mean) income of $31,742, but half (median) had income less than $19,604."). Reduced availability of pensions as an employment benefit, low interest rates that depress investment growth, and waning employment prospects with longer periods of unemployment also make older people more economically insecure. McGhee, *supra* at 5. Moreover, "the value of savings-based sources of income has steadily declined, making Social Security the linchpin of the majority of seniors' livelihoods." *Id.* at 5.

With reduced income and fewer retirement assets at their disposal, older people have "become more vulnerable to the financial stresses of aging. Events like job loss and retirement, illness, death of a spouse, even repairs to aging homes and cars can force seniors to borrow—using credit cards, payday loans, home loans—if they have little savings to rely upon." *Id.* Over one-third of indebted older people have had to rely on credit cards to "pay for basic living expenses such as rent or mortgage payments, groceries, utilities, or insurance because they did not have enough money in their checking or savings accounts." *See* Traub, *supra* at 6.

I, § 108, 123 Stat. 1743 (May 22, 2009) (15 U.S.C. § 1602) [hereinafter CARD Act] to eliminate the worst of such practices. The CARD Act is credited with helping consumers avoid $6 billion in hidden and unfair fees and charges following the first year in which it was implemented. Consumer Fin. Prot. Bureau, CARD Act Report 21-22 (Oct. 1, 2013), http://1.usa.gov/1Q6Rg2t.

B. The bulk of debt in collection is related to unavoidable and unaffordable health care, which can compromise a debtor's ability to pay debt that otherwise would be manageable.

Health related events may result in unavoidable and unaffordable medical bills. "Medical bills account for the majority of debts that are referred to third-party collection agents." *Medical Debt Among People with Health Insurance*, The Henry J. Kaiser Family Foundation Report 14 (Jan. 2014) [hereinafter Kaiser Report], http://bit.ly/24mBUk9. People living in households with high medical debt may "deplete[ ] retirement or college savings, [lose their] homes to foreclosure, [do] without basics such as home heat. [incur] damage to their credit rating permanently reduce[ ] their standard of living [and] experience[ ] barriers to care." *Id.* at 4. Many people with unaffordable medical debt are forced into bankruptcy. *Id.*[3]

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[3] Health concerns triggered the majority of bankruptcies filed by older people (62.1 percent in 2007). David U. Himmelstein, et al., *Medical Bankruptcy in the United States*, 2007, 122 Am. J. Med., 741, 743 (2009), http://bit.ly/1OAQ59v. Bankruptcy filings among people 55 and older rose sharply between 1991 and 2007, with the greatest increases among those 75 and older (up 566.7 percent) and those ages 65 to 74 (a 177.8 percent increase). Deborah Thorne, Elizabeth Warren, & Teresa A. Sullivan, *Generation of Struggle* AARP Pub. Pol'y Inst. 1 (June 2008), http://bit.ly/1Uj0vlC.

The precarious financial condition of many older people, especially in the in the aftermath of the recession, is exacerbated by economic shock. As people age, it is not uncommon for them to incur substantial medical expenses from chronic or acute health conditions as they advance to older ages, corresponding with subsiding income as they begin to retire. "The economic and personal impact of medical debt can be devastating." Kaiser, *supra* at 4. "[M]edical debt [is one of] the most significant barrier[s] to the economic wellbeing of seniors." National Council on Aging Report, *supra*, at 1-2.

Even if people have health insurance, many do not have the income or assets necessary to cover unavoidable medical expenses for doctors, hospitals, prescriptions, co-payments, and more. Kaiser, *supra* at 3-4. Additionally, "[o]ften significant health events trigger[ ] loss of income, rendering unaffordable bills that might otherwise have been manageable." *Id.* "[A]bout one in five debtors (21%) indicated that they had lost at least two weeks' income because of a medical problem" of either a wage earner or spouse." Melissa B. Jacoby & Elizabeth Warren, *Beyond Hospital Misbehavior: An Alternative Account of Medical-Related Financial Distress*, 100 NW U. L. Rev. 535, 549 (2006). Such loss of income can "constitute[] a hard financial blow for families of modest means." *Id.* Unavoidable debt becomes even more unaffordable when consumers are forced to stop working permanently due to their own health or to care for a child, spouse, or parent. *Id.*

C. Economically insecure consumers may be plunged into a collection "nightmare" by unavoidable and unaffordable medical expenses and other financial shocks.

Deepening economic insecurity makes many unsophisticated, low-income, and older people particularly vulnerable to collection abuses that cause substantial distress and exacerbate already precarious personal and financial situations. *See* Jacoby, *supra* at 582 ("worrying about medical-related financial distress may exacerbate health problems"). People who already lack adequate financial means to afford the basic necessities of daily living typically do not have the resources to recover from an economic shock.[4] A chronic health condition or acute injury can result in unaffordable medical expenses and loss of household income that can cascade into a debt collection nightmare. Kaiser Report, *supra*, at 16-17 (outlining the emotional distress "nightmare" for people who find themselves in medical debt).

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[4] *See* Bd. of Governors of the Fed. Res. Sys., Report on the Economic Well-Being of U.S. Households in 2014 1 (May 2015), http://1.usa.gov/1oAZNne (finding "[a]lthough economic hardships are common, many individuals are ill-prepared for a financial disruption and would struggle to cover emergency expenses Forty-seven percent of respondents say they either could not cover an emergency expense costing $400, or would cover it by selling something or borrowing money. Thirty-one percent of respondents report going without some form of medical care in the 12 months before the survey because they could not afford it.").

A person with a serious medical condition can find it extremely difficult to cope with large volumes of confusing medical bills. The effect of an illness or medical event itself can compromise a debtors' ability pay their bills or manage their debts. *See id.* at 4. "Significant health events can also compromise a person's ability to manage the paperwork of medical bills[,]" which can be overwhelming due to sheer volume. *Id.* (finding most survey respondents emphasized "[t]hey had trouble tracking what had been paid, what was owed, and what had been transferred to collections" and that "confusing provider bills and insurance company statements [ ] lacked key information. Most didn't know where to seek help, and the burdens of illness made it harder to resolve problems on their own.").

Consumer debts may go into default due to economic pressures of unaffordable debt levels. Medical debt in particular may be sent to collection due to billing mistakes and insurance disputes that are difficult to resolve. Older people who have diminished capacity are particularly vulnerable to such situations and be unable to resolve them without assistance. *See* Naomi Karp & Ryan Wilson, *Protecting Older Investors: The Challenge of Diminished Capacity* 11, AARP Pub. Pol'y Inst. (Nov. 2011), http://bit.ly/1KQX0Re (describing financial decision making capacity as "one of the first abilities to decline as cognitive impairment encroaches, yet older people, [and] their families. are frequently unaware that these deficits are developing"). Similarly, older people who are socially isolated may be at greater risk of having debts in default. Bd. of Governors of the Fed. Res. Sys., Report on Economic

Well-Being of U.S. Households in 2014 17 (May 2015), http://1.usa.gov/1oAZNne (in survey measuring economic well-being, "27 percent of those experiencing hardships say they received financial assistance from friends or family in the past year, which illustrates the importance of social networks in weathering economic setbacks").

Few debtors facing collections are able to defend themselves effectively from abusive collection practices. They may also be unable to find or afford a lawyer to assist them. *See, e.g.*, Claudia Wilner, et al., *Debt Deception: How Debt Buyers Abuse The System To Prey On Lower-Income New Yorkers*, Neighborhood Econ. Dev. Advocacy Project 6 (2010), http://bit.ly/1Qqfo3T.

D. Debt collectors cause severe distress by intentionally targeting unsophisticated debtors and older people and using abusive debt collection practices in order to exploit their vulnerabilities.

Collection attempts, especially abusive ones, may confuse or threaten vulnerable debtors. In this case, for example, the Sixth Circuit recognized that a letter printed on attorney general letterhead is imbued with abusive and coercive power, finding that "[u]se of the letterhead is intended to induce a higher rate of repayment by intimating that the State of Ohio is in fact sending the letter, which may lead the naïve consumer to prioritize this debt above all others for no good reason." *Gillie v. Law Office of Eric A. Jones, LLC*, 785 F.3d at 1108. Further, the

court found, "[t]here is no compelling reason for special counsel to use the OAG letterhead, other than to misrepresent their authority and place pressure on those individuals receiving the letters." *Id.* at 1105.

Unscrupulous debt collectors intentionally target and abuse unsophisticated and older people in the collection process "based on assumptions that these debtors are easily confused about whether the debt existed, that they fear a collector garnishing their [S]ocial [S]ecurity income, and that they are hesitant to engage in legal skirmishes." Matthew W Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 1 Elder L.J. 135, 152, 156 (2008) (citing Senate hearings on the FDCPA and quoting testimony regarding egregious abuses, including the story of an elderly woman who was told that if she did not pay the funeral expenses for her husband, the collector would get a court order to dig up her husband's body and repossess the casket).

Many older people are vulnerable to debt collection abuses because they misunderstand or fear encounters with the legal system. *Id.* at 152. Some may believe, for example, that they will go to jail if they do not pay a debt being pursued by a collector. Consumers' fears of going to court or being arrested for not paying a debt—rational or not—are constantly reinforced by debt collectors threats.[5]

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[5] *See* CFPB 2015 Annual Report at 14-15 (reporting that 12 percent of complaints about debt collection in 2014 involved the company taking or threatening to take an illegal action. "Most

Such fears are further supported by widespread and increasing media reports describing debtor's prisons and debtors spending days in jail after being arrested on bench warrants or writs of body attachment that debt collectors pursue frequently.[6]

In light of such fears, and as recognized by Congress when it enacted the FDCPA, a letter from an attorney or a court may cause considerable

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of these complaints are about threats to arrest or jail consumers if they do not pay (56%). Other complaints relate to lawsuits including threats to sue on a debt that is too old (23%), being sued without proper notification of the lawsuit (7%), seizures or attempts to seize property (6%), collection or attempts to collect exempt funds such as child support or unemployment benefits (5%), or being sued in a place that is different from where the consumer lives or where the consumer signed the contract (2%)").

[6] *See*, e.g., Brad Reid, *May You Be Imprisoned For Failing to Pay a Debt?*, Huffington Post Blog (Sept. 16, 2015 12:15 PM), http://huff.to/1TxGHdz (outlining an "incomplete list" of circumstances where someone might be imprisoned for financial debt); Joseph Shapiro, *Lawsuits Target 'Debtors' Prisons' Across the Country*, NPR Special Series (Oct. 26, 2015 2:49 PM), http://n.pr/1KIhqMm (outlining six lawsuits filed against cities, police, and courts for their "debtors' prisons."); *cf.* Rebecca Thiess & Ellen Taverna, *Cleaning Up Debt Collection: New rules are necessary to end abusive debt collection practices*, U.S. News (Mar. 24, 2014, 10:45 a.m. EDT), http://bit.ly/1QydhwP (relaying examples of collection abuses that fuel fear of courts, including, "an employed woman who had simply forgotten about a $425 loan was arrested and spent three nights in jail, until her mother finally borrowed $1,250 to pay her bond").

distress.[7] Such debtors may pay a debt—even if they believe they do not owe it, simply to alleviate the stress of the collection attempt, fear of being arrested and sent to jail, or to stop high volumes of harassing and threatening phone calls. *See* Ludwig, *supra* at 154 (describing story of an attorney acting on behalf of a debt collector who threatened he would cause a 68 year old woman to lose her home if she did not pay her debt within a week. She was so distraught that she quit her job so she could draw down her small retirement account to repay the alleged debt.).

Similarly, older people are highly susceptible to threats that they may lose their home or Social Security seized by a collector. *See* Ludwig, *supra* at 138 (discussing the vulnerability of older people to such threats because "'they typically have a great deal of equity in homes that they have owned for many years and because they likely operate on fixed incomes'") (citations omitted). For example, one collector recounted that he targets older people for debt collection because

> [t]hey hear someone saying their social security benefits are being looked into,

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[7] The FDCPA prohibits "[t]he use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval" and "[t]he use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization." 15 U.S.C. §§ 1692e (9), (14).

> their home is being looked into [and] when you've got all this thrown at you and there's someone talking sly on the phone, you're forced to pay

Id. at 156 (citations omitted).

The primary and often only source of income for most older people is Social Security. *See* Wu, *supra*, at 1. Federal law exempts Social Security from attachment because it is designed to provide sufficient income to lift older people out of poverty.[8] *See* Wu, *supra* at 1. Collectors nevertheless threaten to seize it, which will leave the debtor without any income to pay rent, buy food, or obtain health care. If debt collection threats force or mislead them into paying debts using exempt income—particularly debts they do not actually owe—it may leave them with inadequate financial resources to meet their basic needs.

Older consumers living alone are often targets of abusive debt collection tactics. Being socially isolated makes them particularly vulnerable, because they may not have access to friends and family who can help them financially, assist them

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[8] Social Security may not be garnished or attached, except in very specific circumstances, including collection of state taxes, child support, or alimony. 42 U.S.C. § 407 ("The right of any person to any future payment under this title. shall not be transferable or assignable and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.").

with negotiating an affordable payment plan, or take action to defend against the collection of an invalid or overstated debt. *See* Ludwig, *supra* at 155 (describing an eighty-nine year old who was being "hounded for six months by a debt collector" for a debt he did not owe, and it was not until his caretaker and sons got involved that they were "able to sort out the mistake after a number of letters and angry telephone conversations.").

People with unaffordable debt may be able to discharge it in bankruptcy, although that is a result that Congress hoped to discourage by enacting the FDCPA.[9] 15 U.S.C. § 1692(a) ("There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy"). But many people do not or cannot file for bankruptcy. Debtors who are broke but not bankrupt may continue to suffer severe deprivation. Their experiences provide a window into the injury caused by abusive debt collection methods targeted at older, unsophisticated, or low-income consumers. For example, "9.7% report having gone without food while struggling before bankruptcy, 31.2% report being late on rent or mortgage, 31.2% report going without required medication, and 21.2% report skipping doctors' appointments." John A. E. Pottow, *The Rise In Elder Bankruptcy Filings And The Failure Of U.S. Bankruptcy Law*, Law &

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[9] Student loan debt often is not dischargeable in bankruptcy, however.

Economics Working Papers, Paper 17, 246 (2012), http://bit.ly/24pjak2 (even greater percentages of people who filed for bankruptcy suffered similarly; 47.1 percent reported going without required medication and 30.6 percent reported skipping doctors' appointments).

II. THE FDCPA ESTABLISHED A MINIMUM NATIONAL STANDARD OF CONDUCT THAT PROTECTS DEBTORS AND DOES NOT UNDULY LIMIT STATES FROM COLLECTING CONSUMER DEBT USING THIRD-PARTY DEBT COLLECTORS.

A. The FDCPA established a minimum national standard of conduct to protect vulnerable consumers from the abusive practices of third-party debt collectors.

Acknowledging that it is important for consumers to pay their debts, Congress nevertheless disapproved of collectors exploiting the financial, educational, and circumstantial vulnerabilities of debtors. Congressman Frank Annunizzo explained that "[w]hile unscrupulous debt collectors comprise only a small segment of the industry, the suffering and anguish which they regularly inflict is substantial." S. Rep. No. 95-382, at 2.

Congress enacted the FDCPA specifically to protect debtors from an industry that it viewed as having little or no market incentive to treat them properly. Congress noted that "[u]nlike creditors, who generally are restrained by the desire to protect their good will," third-party debt collectors "are

likely to have no future contact with the consumer and are often unconcerned with the consumer's opinion of them." *Id.* Congress knew that collectors, who have a strong "incentive to collect by any means" could exploit the financial, educational, and circumstantial vulnerabilities of debtors. *Id.*

B. The practices prohibited by the FDCPA should not be allowed by any collector.

The Sixth Circuit narrowly interpreted the FDCPA's "state officer" exclusion from the definition of "debt collector." *Gillie v. Law Office of Eric A. Jones, LLC*, 785 F.3d 1091, 1101-1102 (6th Cir. 2015), *cert. granted sub nom Sheriff v. Gillie*, 193 L. Ed. 495 (U.S. Dec. 12, 2015) (No. 15-338). It held that third-party debt collectors serving as independent contractors for the state to collect consumer debts are not excluded from the FDCPA's prohibitions. *Id.* The holding correctly recognized that the exception is narrow and not available to immunize independent contractors like the Petitioners from liability.

Consumers need protection from abusive debt collection practices of third-party debt collectors hired by state governments. Regardless of who hires them, third-party debt collectors of consumer debt have the same inherent financial incentives to collect by any means that Congress sought to counteract by enacting the FDCPA.[10]

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[10] Abuses also result from errors that outsourcing of collections to third-party debt collectors introduces, such as

Moreover, the FDCPA's prohibitions will not interfere unduly with a state's ability to collect consumer debt. It merely requires third-party debt collectors to use any of the wide variety of legal means available to them to collect covered debts.[11]

The FDCPA's explicit language and legislative history clearly reflects "the view that 'certain things ought not to happen, period.'" *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 596 n.14 (2010) (quoting Senate Comm. on Banking, Housing and Urban Aff., Markup Session: S. 1130—Debt Collection Legislation 60 (July 26, 1977) (statement of primary sponsor Senator Riegle)). But

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collecting from the wrong person or in the wrong amount. *See* CFPB 2015 Annual Report, *supra*, at 13 (showing 37% of the complaints received by the CFPB are regarding continued attempts to collect debt not owed); *id.* at 20 (discussing "[f]aulty training materials causing prohibited disclosures to third parties"). Automation of the collections process also introduces errors that result in abuses. *See, e.g.*, Darren Waggoner, *Hospital Computer Glitch Wrongly Sends Accounts to Collections*, Collections&CreditRisk (Feb. 22, 2016), http://bit.ly/1TwPtbD (reporting an estimated 6,200 hospital accounts were inadvertently sent to a collection agency before being submitted to insurance "because of a glitch in changing to a new computer system").

[11] The FDPCA defines "debts" as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. § 1692a(5). Thus, contrary to the assertions of the Petitioners' amici, this case does not implicate the state's collection of non-consumer debts such as taxes, fines, or fees. *See Staub v. Harris*, 626 F.2d 275, 278 (3d Cir. 1980).

exempting third party debt collectors from the reach of the FDCPA opens vulnerable consumers to the suffering and anguish that Congress sought to protect them against.

Petitioners may argue that the facts of this case do not demonstrate a deceptive or misleading practice. But exempting third-party debt collectors hired by a state to collect a consumer debt will clearly open consumer debtors to the possibility of such abuses, and will prevent consumers from challenging conduct that the FDCPA declared should be prohibited.

Petitioners' amici may assert that such abuses are not an issue when a third-party collector is collecting on debts owed to the states. There is ample evidence to the contrary, however. Third-party collectors engaged to collect taxes, parking tickets, fines, and court fees have engaged in widespread shocking and reprehensible behavior toward state residents. *See, e.g.*, Blake Ellis & Melanie Hicken, *The secret world of government debt collection: A CNNMoney Investigation*, CNN Money (Feb. 17, 2015), http://cnnmon.ie/1Ti02kA (exposé of outrageous state government debt collection abuses that clearly would violate the FDCPA if they were covered debts).

The Petitioners' position requires this Court to interpret the FDCPA in a manner that is directly contrary to the broad remedial purposes for which Congress enacted it. It should be rejected. *See Maracich v. Spears*, 133 S. Ct. 2191, 2200 (2013) ("An exception to a "general statement of policy" is

"usually read narrowly in order to preserve the primary operation of the provision") (quoting *Commissioner v. Clark*, 489 U. S. 726, 739 (1989)).

CONCLUSION

For the foregoing reasons, the Sixth Circuit's interpretation of the FDCPA should be affirmed. A third-party debt collector hired on a contingency fee basis to collect debt owed to a state is not included within the FDCPA's narrow exception for state officers.

March 2, 2016 Respectfully submitted,

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No. 15–338

IN THE
Supreme Court of the United States

MARK J. SHERIFF, ET AL.,

Petitioners,

v.

PAMELA GILLIE AND HAZEL MEADOWS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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INTEREST OF *AMICUS CURIAE*[1]

Amici are law professors who specialize in consumer law and who have previously published on, or have interest in, the consumer rights that are threatened in this case. *Amici* have no personal stake in the outcome of this case, but have a strong interest in seeing that case law interpreting the federal Fair Debt Collection Practices Act advances the critical protections of this important legislation.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief and no person other than *amici curiae* or their counsels made a monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.3, this brief has been submitted within the 7 day period after respondents brief was filed. Each party has consented to the filing of this brief, and copies of consents are on file with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Fair Debt Collection Practices Act was passed to eliminate abusive, deceptive, and unfair debt collection practices committed by third-party debt collectors. 15 U.S.C. § 1692 et seq. (2012). Evidence was presented to Congress to show that incentive structures and the one-off nature of the job made the position rife for abuse, in contrast with in-house collectors. S. Rep. No. 95-382, at 2–3 (1977). Congress thus passed the FDCPA with exemptions for State officials and in-house collectors. 15 U.S.C. § 1692a(6)(C) (2012). The Act has since been amended to include attorneys that practice debt-collection, due to their functional equivalence to conventional, third-party counterparts. 131 Cong. Rec. H225-02 (daily ed. Jan. 31, 1985) (statement of Rep. Annunzio).

Although the language of the FDCPA is clear, the State of Ohio now asks this Court to redefine the FDCPA's plain language. The State of Ohio asks this Court to hold that third-party debt collectors are instead State officers, simply because they intermittently collect debts on behalf of the State. This would allow debt-collectors to use misleading letterhead, despite the fear and uneasiness it can cause in debtors. Importantly, such tactics would not be restricted to the realm of student tuition debt: debt-collectors already use such unscrupulous tactics in the collection of student loan debt, bad check restitution programs, municipal services debts and federal taxes.

To rule that an independently contracted, third-party debt collector is a State official would undermine the intent of Congress, the plain language of the statute, and the critical protections of the FDCPA.

ARGUMENT

I. The Legislative History Shows that Congress was Chiefly Concerned with Abusive, Deceptive, and Unfair Practices Committed by Third-Party Debt Collectors.

The express purpose of the Fair Debt Collection Practices Act ("FDCPA") is to eliminate "abusive, deceptive, and unfair" debt collection practices. 15 U.S.C. § 1692 (2012). As the legislative history suggests—and the final version of the FDCPA conclusively shows—the chief evil Congress intended to remedy was "abusive, deceptive, and unfair" debt collection practices committed by third-party debt collectors. *Id.* at § 1692a(6) (defining debt collector as "any person who regularly collects or attempts to collect, debts owed or due or asserted to be owed or due another."

A. The Need to Regulate In-House Debt Collectors Was Brought to Congress' Attention and Congress Chose to Regulate Third-Party Debt Collectors Because of Their Particular Incentives for Abuse.

During the initial subcommittee hearing on the FDCPA, Representative Chalmers Wylie explained that he did not cosponsor the legislation due to its

limited scope. He stated: "I have not cosponsored [the House legislation], mostly because the bills apply exclusively to independent debt collectors It does not apply to any in-house debt collector." *The Debt Collection Practices Act: Hearing on H.R. 11969 Before the Subcomm. on Consumer Affairs*, 94th Cong. 26 (1976) (hereinafter "Hearing on H.R. 11969") (statement of Rep. Wylie, Member, Subcomm. on Consumer Affairs). Several members and invited speakers echoed Representative Wylie's statements. *Id.* at 180 (statement of Jack Fletcher, Member, American Collectors Association's National Legislative Council); *id.* at 238 (statement of Joel Weisberg, Director, Bureau of Consumer Protection, Pennsylvania); *id.* at 253 (statement of Richard Gross, Deputy Chief, Consumer Protection Division, Massachusetts). Others termed the bill as "discriminatory" and possessing a "big hole." *The Debt Collection Practices Act: Hearing on H.R. 29 Before the Subcomm. on Consumer Affairs*, 95th Cong. 179 (1977) (hereinafter "Hearing on H.R. 29") (statement of John W Johnson, Executive Vice President, American Collectors Association); *id.* at 297 (statement of Phillip Rosenthal, President, Virginia Collectors Association).

Despite such ardent critique, Congress pressed on and passed the FDCPA to remedy abuses committed by third-party debt collectors. *See* S. REP No. 95-382, at 2 ("The committee has found that debt collection abuse by third party debt collectors is a widespread and serious national problem."). It did so because it found that third-party debt collectors were the chief source of problems due to their incentives

to engage in unscrupulous tactics, which are not present for in-house collectors.

A Senate Report—issued by the Committee on Banking, Housing, and Urban Affairs—explicitly noted that "independent debt collectors are the prime source of egregious collection practices." S. REP No. 95-382, at 2. Such practices included, for example, giving a collection letter an official gloss: this included using "impressive gold seals [and] attorney letterhead." *Hearing on H.R.* 11969 (statement of Rep. Wylie, Member, Subcomm. on Consumer Affairs). Another was for debt-collectors to misrepresent that they were "government official[s]." S. REP No. 95-382, at 8.

While Congress was aware that in-house collection abuse can occur, the Senate report noted that the incentives for in-house and third-party collectors are simply not the same. *Id.* at 2–3. An independent debt collector will not have future contact with the consumer; an in-house collector will. *Id.* at 2. Further, independent debt-collectors—like the independent debt-collectors in the instant case—are paid on their ability to collect as many debts as possible, thereby increasing the likelihood of a debt-collector using any tool that will increase their ability to collect a debt. *Id.*; *see Gillie v. Law Office of Eric A. Jones*, 785 F.3d 1091, 1095 (6th Cir. 2015) ("Such special counsel shall be paid for their services from funds collected by them in an amount approved by the attorney general."). Unless literally an employee of the government, a third-party debt collector working on behalf of the government falls

squarely within the category of debt-collectors Congress passed the FDCPA to regulate.

And, although the initial bill exempted attorneys, Pub. L. No. 95-109, §803(6)(F), 91 Stat. 874, 875 (1977), later amendments extended the FDCPA to cover attorneys, in large part because they are "identical to their conventional [third-party, private] counterparts." 131 Cong. Rec. H225-02 (daily ed. Jan. 31, 1985) (statement of Rep. Annunzio).

The clarity of the Congressional history has led to an equally clear text: from its initial passage to today, the FDCPA is concerned with third-party debt-collectors specifically because they are more likely to engage in abusive practices. 15 U.S.C. § 1692.

B. Exempting Private, Third-Party Independent Contractors from the Act's Proscriptions Is Inconsistent with the History and Clear Text of the FDCPA.

To illustrate why exempting private, third-party independent contractors is inconsistent with the history and text of the FDCPA, one need look no farther than the facts of this case.

Under Ohio law. the Ohio Attorney General is allowed—after a certification process not relevant here—to collect debts owed to state entities. Ohio Rev. Code Ann. § 131.02(C) (West). Although able to hire and retain a full-time staff to collect such debts, the Ohio Attorney General may also appoint special counsel to collect debts on behalf of the Attorney General. Ohio Rev. Code Ann. § 109.08 (West). Once selected, special counsel enters into a retention

agreement with the Attorney General. *Gillie*, 785 F.3d at 1095. The retention agreement specifically defines the special counsel as an "independent contractor." *Id.*

This independent contractor relationship falls under the FDCPA. *Id.* at 1102. To be exempt from the FDCPA as an "officer or employee of the United States or any State," such officer must collect debt "in the performance of his official duties." 15 U.S.C. § 1692a(6)(C). An independent contractor is not an "officer or employee" of a State. *Gillie*, 785 F.3d at 1101–02. As the Sixth Circuit noted, the Ohio Attorney General cannot have it both ways: the State cannot classify its relationship with independent, third-parties as a relationship with an independent contractor while simultaneously claiming such individuals are also employees. *Id.* at 1102. Ohio could have hired full-time debt collectors and, thus, triggered the (6)(C) exemption; it chose not to.

Stated simply, it works absurdity into the law to allow a third-party, private debt collector to eschew the mandates of the FDCPA simply because she intermittently collects debts on behalf of a State entity. The FDCPA was enacted because Congress was presented with evidence that third-party debt collectors were abusing the system on a "widespread and national" scale. S. REP No. 95-382, at 2 (1977). An example of such abuse was the use of "impressive gold seals [and] attorney letterhead," to give dunning letters an official gloss. *Hearing on H.R. 11969* (statement of Rep. Wylie, Member, Subcomm. on Consumer Affairs). To allow

an attorney to use the "impressive" seal of the Ohio Attorney General's office, free from the requirements of the FDCPA, is to ignore both the text and substantive history of the FDCPA.

II. The Use of Misleading Letterhead by Third Party Debt Collectors Causes Fear and Uneasiness in Debtors.

Debtors justifiably feel misled by private debt collectors when they send collection notices on letterhead belonging to another entity.

This practice is misleading, whether in situations involving large sums of payment, such as the issue present in this case—student tuition debt—or scenarios as benign as bad checks. Because the primary concern of the FDCPA is to protect the "uninformed, the naïve and the trusting" consumer, collection agencies are not permitted to behave in a manner that may mislead even an unsophisticated debtor on the receiving end of the notice. *Avila v. Rubin*, 84 F.3d 222, 226 (7th Cir. 1996).

A. A Debt Collector's Use of Misleading Letterhead from the Office of the Attorney General is Also a Species of a More Common Illegal Tactic.

One of the provisions in the FDCPA prevents the use of "false representation or implication that any communication is from an attorney." 15 U.S.C. § 1692e(3) (2012). Congress gave the FTC the authority to enforce the Act, including this provision, in order to eliminate abusive debt collection practices and to protect consumers from being poached by higher authorities when they are

uninformed. The FTC and CFBP have indeed found that there were instances of debt collectors filing collection suits without strong evidence of debt. *Brief of Consumer Financial Protection Bureau and Federal Trade Commission for Appellee*, *Bock v. Pressler & Pressler LLP*, No. 15-1056 (3d Cir. Aug. 13, 2015), 2015 WL 4910765. The FTC and CFBP stated that an attorney's "imprimatur" will cause debtors to act on the notice. *Id.* at 11. Although this exact provision is not at issue in the present case, the use of Attorney General letterhead by individuals other than the Attorney General implicates the same deception—on a grander scale—that § 1692e(3) protects against.

By sending letterhead from an entity of higher authority rather than just a third party debt collector/collection agency, "an unsophisticated consumer, getting a letter from an 'attorney,' knows the price of poker has just gone up. And that clearly is the reason why the dunning campaign escalates from the consumer, to the attorney, who is better positioned to get the debtor's knees knocking." *Avila*, 84 F.3d 229. Receiving a letter from an attorney also implies that there has been personal involvement from the attorney into the specific debtor's file and that the attorney reached a professional judgment that the debtor would be a candidate for legal action. *Id.*

If this is the case, it is understandable why a debtor would react even more promptly to an "imprimatur" belonging to an Attorney General. A consumer is "inclined to more quickly react to an attorney's threat than to one coming from a debt

collection agency," given "the special connotation of the word 'attorney' in the minds of delinquent consumer debtors." *Id.* It is reasonable to assume that the words "attorney general" would create an even quicker response, considering that the plaintiffs in this case both ultimately sought out private counsel. *Gillie*, 785 F.3d at 1096.

B. Allowing Private Debt Collectors to Use Law Enforcement Letterhead is Misleading Because It Allows an Entity Otherwise Subject to the FDCPA to Pass as an Exempt Entity.

Courts have previously observed that, when a debt collector uses a law enforcement agency's letterhead, it creates a false impression about the sender, violating the FDCPA. *See* 15 U.S.C. §1692e(1) (2012); *Gammon v. GC Services*, 27 F.3d 1254, 1257 (7th Cir. 1994) ("[T]he FDCPA forbids a range of implications wider than merely the direct representation that the debt collector is or is a part of state or federal government."). If the FDCPA forbids a "range of implications" beyond direct representation, then surely the FDCPA prohibits the misleading impression in the present case, where the private, third-party debt-collector is attempting to pass as an exempt State collector.

A recent case illustrates how the use of such letterhead can be misleading. In *Shouse ex rel Paxon v. Nat'l Corrective Group, Inc.*, the National Corrective Group (NCG) used the letterhead of the local District Attorney's office on an official notice sent to the debtor. *Shouse ex rel. Paxon v. Nat'l Corrective Group*, 2010 WL 4942222, at 4 (M.D. Pa.

Nov. 30, 2010).[2] The debtor had allegedly sent bad checks. *Id.* at 1. NCG had an agreement with the local district attorney office, whereby NCG collected the dishonored checks while the district attorney provided official letterhead and access to the district attorney's office. *Id.* Under this agreement, the NCG could qualify be exempt from the FDCPA only if "bad check offenders participate voluntarily." 15 U.S.C. § 1692p(a)(2)(A) (2012). NCG argued that the plaintiffs entered the program voluntarily and filed a motion to dismiss. *Shouse*, 2010 WL 4942222, at 1. The plaintiffs contended that the communications were intentionally used to mislead the debtor into believing they are dealing with the district attorney's office[3] and, thus, participation in such programs was not voluntary. *Id.*

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[2] An amendment to the FDCPA created an explicit exception for district attorney-sanctioned pretrial diversion programs for alleged bad check offenders. 15 U.S.C. § 1692p (2012). This amendment creates the possibility that third party collectors mislead debtors by shrouding themselves under the cloak of an entity excluded from the title of a debt collector. While the bad check program is not at issue in this case, the impact of the district attorney's letterhead on the debtor is similar.

[3] Although the district attorney was involved in the matter, this involvement was not materially different than the Attorney General's in the instant case. The district attorney and Attorney General do receive the funds collected, but do not participate in the actual collection. *Gillie*, 785 F.3d at 1095; *Shouse*, 2010 WL 4942222, at 1. In both instances, the debtors deal solely with the independently contracted, third-party debt collectors—a relationship expressly governed by the FDCPA. 15 U.S.C. § 1692a(6).

The court denied NCG's motion to dismiss, holding that the plaintiffs had pled sufficient facts to claim that collector was not within the exemption of the FDCPA because the language in the letter, as well as letterhead and insignia of the DA, did not permit voluntary participation from the debtor under the standard of the least sophisticated consumer. *Id.* at 4. Importantly, the debtor complained that "these communications are designed to intentionally mislead the recipient into believing that they are dealing with the district attorney's office when in fact they are dealing with a private debt collection agency, and that they are then essentially coerced into paying under the implicit threat that unless they do so they will be criminally prosecuted." *Id.* at 1.

Higher authorities are at times enlisted for collection from debtors to ensure that the debtor understands the significance of the outstanding debt. When debtors receive notices that seem threatening in these situations, they tend to react with impulse and anxiety. One debtor described being thrown "into a panic" after a collection agent "insisted that her debt couldn't be negotiated, settled, or paid off more slowly." Martha C. White, *Dirty Tricks of Debt Collection: What You Need to Know*, DAILY FINANCE (2010), http://www.dailyfinance.com/2010/01/18/debt-collectors-dirty-tricks-what-you-need-to-know

Another common example of employing a higher authority can be seen with respect to debt collector's enlisting a lawyer or law firm to collect debts, without having the lawyer or firm look into the

specific files of the debtors. In *Clomon v. Jackson*, 988 F.2d 1314 (2d Cir. 1993), for example, an attorney hired by NCB—a debt collection agency—provided his approval and signature to dunning letters without ever "review[ing] [the debtor's] file." *Clomon*, 988 F.2d at 1317 The letters would be sent to the debtor on a predetermined schedule, with a mechanically reproduced facsimile of the attorney's signature. *Id.* at 1316–17. The Second Circuit held that such actions were misleading and in violation of the FDCPA. Specifically, the majority stated:

> First, the use of Jackson's letterhead and signature on the collection letters was sufficient to give the least sophisticated consumer the impression that the letters were communications from an attorney. This impression was false and misleading because in fact Jackson did not review each debtor's file; he did not determine when particular letters should be sent; he did not approve the sending of particular letters based upon the recommendations of others; and he did not see particular letters before they were sent—indeed, he did not even know the identities of the persons to whom the letters were issued. In short, the fact that Jackson played virtually no day-to-day role in the debt collection process supports the conclusion that the collection letters were not "from" Jackson in any meaningful sense of that word. Consequently, the facts of this case establish a violation of [the FDCPA].

Id. at 1320. These practices remain common. *See Lesher v. Law Offices of Mitchell N. Kay*, 650 F.3d 993, 1001–03 (3d Cir. 2011), cert denied, 132 S.Ct. 1143 (2012). *See also Bock v. Pressler & Pressler*, 30 F. Supp. 3d 283, 286 (D.N.J. 2014) (holding that filing a civil complaint without reviewing debtor's file is also a violation of the FDCPA).

The FDCPA was enacted precisely to prohibit practices that lead to such unfounded fear and anxiety. 15 U.S.C. § 1692. If it is misleading for non-attorneys to use attorney letterhead to collect debts because of the unfounded fear that practice creates, then a collector's use of Attorney General letterhead is even more likely to make a debtor unjustifiably fearful—perhaps to the point of fearing criminal charges.

III. The Government's Use of Third-Party Debt Collectors Is Not Limited to the Collection of Student Tuition Debt.

The government's use of third party debt collectors is not limited to the collection of student tuition debt. Currently, the government uses third party debt collectors in many areas, including the collection of student loan debt, bad check restitution programs, municipal services debts, and federal taxes. Allowing debt collectors to continue to use practices similar to the ones here will cause untold harm to consumers, as the collectors will be able to bully debtors into prioritizing their payments using the guise of government authority.

Third parties are involved in the guaranty and collection of student loan debt. *Brannan v. United*

Student Aid Funds, 94 F.3d 1260, 1261 (9th Cir. 1996). In *Brannan*, the plaintiff took out a loan from a private bank through a federal student loan program. *Id.* at 1262. United Student Aid Funds ("United"), was the guarantor of this loan under a contract with the United States Department of Education. *Id.* Brannan defaulted on the loan and United then began collection efforts; United, *inter alia*, threatened to cause her to lose her job, communicated to third parties regarding her debt, and refused to communicate about the debt through her attorney. *Id.* The court held that United was not an officer or employee of the federal government and thus was within the scope of the FDCPA. *Id.* at 1263. Notably, the Ninth Circuit held that United did not fall under the government actor exemption to the FDCPA. *Id.* The court held that such an exemption only applies to an individual government official or employee "who collects debts as part of his government responsibilities." *Id.* It was beyond the clear language of the FDCPA to apply the exemption to an individual organization with a government contract. *Id. See also Pollice v. Nat'l Tax Funding*, 225 F.3d 379, 406 (3d Cir. 2000) (holding that § 1692a(6)(C) applies only to state "officers" or "employees" and that it "does not extend to those who are merely in a contractual relationship with the government.").

To give third-party debt collectors of student loan debt the ability to use official government letterhead during the collection process is to provide predatory lenders another tool to cajole and coerce vulnerable people into prioritizing student debt payments over other debts that they may have accrued. Student

loan debt would thus become an even heavier burden, as borrowers would be scared into putting off other investments and purchases due to the perceived threat of government action.

As noted *supra* in Section II, one of the more egregious practices currently in use is the use of local prosecutor's official letterhead by private debt collectors as part of bad check restitution programs. *Shouse,* 2010 WL 4942222, at 1. Although the NCG diversion program was intended to be an optional alternative to court proceedings, the court held that the use of the local prosecutor's letterhead and official language threatening fines and jail time caused those who received them to "believe that they had better respond to the notice." *Id.* at 4. A ruling in favor of the Ohio Attorney General where could be extended to allow debt-collectors to contravene the clear language of 15 U.S.C. § 1692p. The statute—which exempts certain bad check enforcement programs—requires participation by debtors to occur "voluntarily." *Id.* at (a)(2)(A). To allow private entities to use official law enforcement letterhead would render the "voluntarily" language a dead letter, as the least sophisticated consumer could think they must enter the program or face prosecution. *See Shouse*, 2010 WL 4942222, at 4. This type of intimidating action is not limited in scope, but has been used repeatedly throughout the country.

In *Liles v. Am. Corrective Counseling Servs.*, the Jefferson County Attorney's office contracted with American Corrective Counseling Services ("ACCS") to run a similar bad check restitution program. *Liles*

v. Am. Corrective Counseling Servs., 201 F.R.D. 452, 453 (C.D. Iowa 2001). However, in *Liles*, the notice sent by ACCS to the plaintiff was unrelated to any court process, and the County Attorney had no knowledge of the delinquent check on which ACCS was attempting to collect. *Id.* If the court were to rule in favor of petitioners, it would be giving unscrupulous third party debt collectors—such as ACCS and NCG—the green light to continue their deceptive practices and could encourage other third-party debt collectors to begin using the practice in an effort to collect on debts through deception and intimidation.

Another area in which the Court's holding will have an impact is in the collection of municipal water and sewer debts, and related debts for municipally-provided services. The federal courts have already seen litigation over the unscrupulous actions of third-party attorney debt collectors, including threatening liens and sheriff's sales. *Piper v. Portnoff Law Associates, Ltd.*, 396 F.3d 227 (3d Cir. 2005). Giving these debt collectors the ability to make these threats on official government letterhead would make them seem all the more plausible.

Finally, the Court's holding may have impact in the collection of qualified inactive tax receivables due to the federal government.[4] In 2015, President

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[4] The IRS is empowered by federal law to outsource the collection of federal tax debts by entering into "qualified tax collection contracts." 26 U.S.C. § 6306 (2012).. The tax-collector is paid according to the amount collected. *Id.* at § 6306(c). The law expressly states that the FDCPA shall apply to any

Obama signed into law a provision which required the IRS to begin to use private debt collection agencies to recover unpaid tax debt. The Association of Credit and Collection Professionals, *IRS Partnership With Debt Collection Agencies Becomes Law*, ACA INTERNATIONAL, (Dec. 7, 2015), http://www.acainternational.org/governmentaffairs-irs-partnership-with-debt-collection-agencies-becomes-law-37779.aspx. Giving third party debt collectors the ability to use official IRS letterhead when collecting qualified federal taxes is no doubt intimidating, as it gives a private entity the appearance of federal power.

In sum, if this Court sanctions the practice of the Ohio Attorney General, it is likely the practice will spread, as debt collectors contracting with state and federal governments look for new tools to increase their recoveries. Rather, the Court should declare this tool off-limits and uphold the explicit language of the FDCPA.

"qualified tax collection contract," except to the extent superseded by any other provision the Internal Revenue Code. *Id.* at § 6306(e).

CONCLUSION

For the foregoing reasons, *amicus* respectfully ask this Court to rule, consistent with the intent and language of the FDCPA, that third-party debt collectors contracting with a State should not be permitted to cloak themselves in official immunity from FDCPA liability, and that their use of official government letterhead is materially misleading under the FDCPA.

Respectfully submitted,

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APPENDIX

APPENDIX A—LIST OF SIGNATORIES*

Peter S. Wright is the Director of the Consumer and Commercial Law Clinic at the University of New Hampshire School of Law. The clinic litigates consumer credit cases at the trial and appellate levels, including defense of debt collection, foreclosure and consumer bankruptcy. Besides teaching Consumer Credit and Bankruptcy, Professor Wright also works with legislative committees and staff on state and federal legislation impacting consumers in these areas.

Richard Alderman is the Director of the Center for Consumer Law at the University of Houston Law Center. Professor Alderman has published several articles and books in the field and is currently the Editor-in-Chief of the Journal of Consumer and Commercial law, the official publication of the Consumer and Commercial Law Section of the State Bar of Texas.

Judith Fox is the director of the Economic Justice Center, a clinical law program at the University of Notre Dame. The clinic represents low and moderate income clients in mortgage foreclosure and debt collection issues. Professor Fox researches and writes on issues involving debt collection and mortgage foreclosure and serves on the Consumer Financial Protection Bureau Consumer Advisory

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* University affiliation of the professors is given for identification purposes only, and implies no endorsement by the universities.

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Creola Johnson specializes in predatory consumer transactions, including payday loans and subprime mortgages. Professor Johnson has been published several times in the field and has been recognized for her excellence in the field by The Ohio State University Moritz College of Law President's Club.

Gary J. Pieples is the Director of Securities Arbitration and Consumer Clinic at Syracuse University College of Law. In addition to an active practice representing families in evictions and foreclosures, Professor Pieples has presented on consumer credit collection actions and has worked on neighborhood stabilization projects representing community groups on issues of blight abatement, community development, and housing policy. After graduating from the Indiana University School of Law, Professor Pieples clerked for Judge S. Arthur Spiegel of the Southern District of Ohio.

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In the Supreme Court of the United States

MARK J. SHERIFF, SARAH SHERIFF, WILES BOYLE, BURKHOLDER & BRINGARDNER CO., LPA, AND MICHAEL DEWINE, ATTORNEY GENERAL OF OHIO, PETITIONERS

v.

PAMELA GILLIE AND HAZEL MEADOWS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND 11 OTHER STATES IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the Dictionary Act's definition of "officer" unambiguously exclude all private contractors, such that the special counsel appointed by Ohio's Attorney General to undertake his duty to collect debts owed to the State are not state "officers" for purposes of the Fair Debt Collection Practices Act?

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INTEREST OF *AMICI CURIAE*

The Constitution itself establishes our dual system of government, which divides power "between the National Government and the States." *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011). This federalism is important because dividing governmental power "secures the freedom of the individual" as part of our constitutional system of "checks and balances." *Id.* at 2364–65. Federal intrusion into state sovereignty is thus of paramount concern for States and State Attorneys General.

Part of the liberty protected by federalism is the freedom of citizens to define "the structure of [State] government [ ] and the character of those who exercise government authority." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). This sovereignty allows States to carry out their core functions with pragmatism and flexibility. The Sixth Circuit's overly narrow interpretation of the Dictionary Act's definition of "officer" violates an important canon designed to preserve federalism: the clear-statement rule. This canon protects against the erosion of state authority—and the concomitant dilution of each individual's ability to influence public policy—without a clear congressional directive. Because the Act's definition of "officer" does not plainly exclude private contractors who are carrying out state sovereign duties under the authority of state statute, the decision below encroaches on States' flexibility to determine how to best govern themselves and thus warrants review.

INTRODUCTION AND SUMMARY OF ARGUMENT

When this Court was deciding *Gregory*, thirteen states signed on to an *amicus* that supported the clear-statement rule. Brief for Colorado & Florida et al. as *Amici Curiae* Supporting Respondent, *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991) (No. 90-50). Those States were concerned about maintaining a proper federal-state balance. This Court agreed, justifying the rule on that very basis. *Gregory*, 501 U.S. at 460.

That same principle is at stake here. The Fair Debt Collection Practices Act (FDCPA) relies on the Dictionary Act definition of "officer," defined as "any person authorized by law to perform the duties of the office." 1 U.S.C. § 1 (2012). This definition encompasses the special counsel that Ohio's Attorney General appoints to assist in debt collection. These special counsel are not *mere* independent contractors. By virtue of the Ohio statute that authorizes their hire and the duties they perform, they stand in the shoes of the Ohio Attorney General for debt-collection purposes. The opinion below, which nonetheless holds that they are not officers who wield any sovereign power, Pet. App. 43a, violates the clear-statement rule and limits States' authority to decide whether and on what terms they hire private contractors to assist them in their sovereign duties.

Private contractors serve States in various capacities. To be sure, not every private contractor is an officer. Indeed, not every private contractor is "authorized by law," and as Judge Sutton noted in dissent, "sovereign power remains a precondition of officer status." Pet. App. 62a. So, irrespective of the importance

of their work, no one presumes building-maintenance or road-construction workers are standing in the shoes of a state official. But where the "authorization" and "duty" conditions are met, States that exercise their sovereign power through independent contractors are entitled to benefit from those contractors having state-officer status. This is true whether in debt collection or in other areas where federal statutes use the Dictionary Act definition of "officer."

The rule embodied in the opinion below also undermines the authority of State Attorneys General. They must have the flexibility to delegate their powers to outside counsel and duly designated deputies. And they are entitled to applicable exemptions such as the state-officer exemption under the FDCPA.

The FDCPA's state-officer exemption serves as a critical tool for States as they respond to increasingly complex tax structures and fiscal challenges. A number of States use private contractors to collect debts, and a number of State Attorneys General appoint special counsel for this purpose. Because Congress has not spoken clearly in the FDCPA to cover States, they are entitled to structure their debt-collection activities so their private contractors qualify as "officers." States have the sovereign right to determine if and how they will collect the debts owed to them. Pet. App. 55a.

This Court should reverse the Sixth Circuit and hold that the Fair Debt Collection Practices Act does not apply to private contractors who are authorized by law to perform state sovereign functions.

ARGUMENT

I. Courts should not interpret statutes as altering the federalism balance unless Congress expressly states that intent.

Federalism arises from the Constitution itself. "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory*, 501 U.S. at 457. The Constitution balances the power between these two sovereignties, reserving to the States or to the people all powers the Federal Compact has not delegated to the United States. U.S. Const. amend. X. Justice Story described the Tenth Amendment as "a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities." 3 J. Story, Commentaries on the Constitution of the United States 752 (1833).

Federalism exists to protect and promote individual liberty. The authors of *The Federalist* recognized this, specifically noting the value of federalism in curbing abuses of governmental power. Alexander Hamilton wrote that while the general government would check the "usurpations of the state governments, the state governments "will have the same disposition towards the general government." *The Federalist* No. 28, at 179 (A. Hamilton) (J. Cooke ed. 1961). James Madison likewise explained, "The different governments will control each other, at the same time that each will be controlled by itself." *The Federalist* No. 51, at 351 (J. Madison) (J. Cooke ed. 1961). States,

Madison emphasized, retain powers that are "numerous and indefinite." *Gregory*, 501 U.S. at 457–58 (quoting *The Federalist* No. 45, at 292–93 (James Madison) (Clinton Rossiter ed. 1961)).

This Court too has repeatedly explained that "[f]ederalism secures the freedom of the individual." *Bond*, 131 S. Ct. at 2364. Indeed, "[s]tate sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.' " *Id.* (quoting *New York* v. *United States*, 505 U.S. 144, 181 (1992) (some internal quotations omitted)). Federalism advances liberty in a number of ways:

- it promotes "decentralized government that will be more sensitive to the diverse needs of a heterogeneous society";
- it "increases opportunities for citizen involvement in democratic processes";
- it "allows for more innovation and experimentation in government";
- it "makes government more responsive by putting the States in competition for a mobile citizenry"; and
- it provides "a check on abuses of government power." *Gregory*, 501 U.S. at 458.

Because of the importance of federalism to our constitutional structure, this Court applies a clear-statement rule when interpreting statutes: "[I]f Congress intends to alter the 'usual constitutional balance

between the States and the Federal Government, it must make its intention unmistakably clear in the language of the statute.' " *Gregory*, 501 U.S. at 460–61 (quoting *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 243 (1985)). The burden is on Congress to use unambiguous and targeted statutory language. Courts may not consider less clear indicia of legislative intent or place their own overlay onto the statutory language.

A. The clear-statement rule protects the balance between the States and the federal government.

The clear-statement rule safeguards the important value discussed above: preserving the federal-state balance. Indeed, this Court explained that "congressional interference" in state internal matters of great importance "would upset the usual constitutional balance of federal and state powers." *Gregory*, 501 U.S. at 460.

In numerous cases both before and after *Gregory*, this Court has applied the clear-statement rule to protect States from unwarranted federal encroachment into traditional areas of state authority. See, e.g., *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006) (plurality opinion) ("We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority"); *Gonzales* v. *Oregon*, 546 U.S. 243, 274 (2006) ("[T]he background principles of our federal system [ ] belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power."); *Solid Waste Agency of N. Cook, Cty.* v. *U.S. Army Corps of Eng'rs*,

531 U.S. 159, 173 (2001) ("This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."); *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) ("[W]hen the Federal Government takes over local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit.") (internal citations omitted); *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting *United States* v. *Bass*, 404 U.S. 336, 349 (1971)) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.").

B. The opinion below disregards the clear-statement rule and limits the States' authority to deputize contractors to assist in core state duties.

"[W]ho can deny that plaintiffs' interpretation of 'officer' 'trench[es] on the States' arrangements for conducting their own governments?' " Pet. App. 58a (Sutton, J., dissenting) (quoting *Nixon* v. *Mo. Mun. League*, 541 U.S. 125, 140 (2004)). Yet, any such federal legislation should be "treated with great skepticism" and, in the absence of an " 'unmistakably clear' " statement otherwise, should be "read in a way that preserves a State's chosen disposition of its own power." *Nixon*, 541 U.S. at 1410.

Yet the Sixth Circuit majority ignored the States' important authority to structure themselves when it concluded that appointed special counsel cannot be officers of the State within the meaning of the FDCPA. Pet. App. 29a. This conclusion is not only erroneous but also conflicts with the approach of the only other circuit to address the issue, the Third Circuit, which held that the Philadelphia Municipal Court's appointed Landlord and Tenant Officer was an "officer." *Heredia* v. *Green*, 667 F.2d 392, 396 (3d Cir. 1981). Both *Heredia* and the dissent here recognized that adherence to the clear-statement rule protects fundamental federalism principles.

Further, the decision below misses the point of the clear-statement rule—that it applies when ambiguity exists and resolves ambiguity in favor of preserving state sovereignty. If the Dictionary Act's definition of "officer" is ambiguous in a particular context—and here, Plaintiffs conceded that the term was "open to multiple[] yet reasonable interpretations," Pet. App. 60a—then the exemption for state officers applies precisely because Congress has not *un*ambiguously regulated core state functions. Pet. App. 58a (Sutton, J., dissenting). As this Court has articulated, the clear-statement rule "resolves ambiguities in federal statutes" based on basic principles of federalism. *Bond*, 134 S. Ct. at 2090. Because the Sixth Circuit failed to follow the rule, it fell into the very peril this Court has identified: " 'to give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* [v. *United States*, 105 S. Ct. 479 (1984)] relied to protect states' interests.' " *Gregory*, 501 U.S. at 464 (quoting L. Tribe, American Constitutional Law § 6-25, at 480

(2d ed. 1988)); *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 607 (1991) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (" 'Mere silence cannot suffice to establish a clear and manifest purpose to pre-empt local authority.' ")).

C. The decision below encroaches on the authority of State Attorneys General.

There is another reason why the opinion below matters to States other than Ohio. State Attorneys General must have the flexibility to delegate their powers to outside counsel and duly designated deputies—and accordingly, to balance any inherent liability with the benefits of any applicable exemptions such as the FDCPA's state-officer exemption.

The office of attorney general dates back to thirteenth and fourteenth century England when the *attornatus regis* served as the sovereign's primary legal representative and wielded considerable power that was subject to limitation only by the King. That office was carried over to colonial America as the office of attorney general. William C. Haflett, Jr., *Tice v. Department of Transportation: A Declining Role for the Attorney General?*, 63 N.C. L. Rev. 1051, 1053, (1985). As a state judge reminded, "[O]ne of the principal reasons that our founders established an Attorney General's office was to assure that important legal issues that will affect all state agencies had an advocate who is able to bring the expertise of government-wide representation before this Court, when we consider matters of overall importance to state government." *West Virginia Div. of Envtl. Protection* v. *Kingwood Coal*

Co., 490 S.E. 2d 845 n.1 (W. Va. S. Ct. App. 1997) (Starcher, J., dissenting).

Whether by constitution or by statute, all fifty states have an office of attorney general, and most recognize the Attorney General's considerable common-law powers. 7 AM JUR 2D *Attorney General* § 7 (2015). In almost every state, the Attorney General is the chief law officer. See, e.g., *Hodge* v. *Commonwealth*, 116 S.W.3d 463, 474 (Ky. 2003) (noting that "the Attorney General is the chief law officer and chief prosecutor of the Commonwealth").

Because of heavy workloads and responsibilities spanning a host of issues, State Attorneys General must often delegate their authority to outside counsel. 7A C.J.S. *Attorney General* § 25 (2015) ("[A] state statute may allow the attorney general to employ special counsel on a fee or salary basis," subject to certain constraints on supervision and control.). Ohio might want to appoint special counsel to represent the state in proceedings in which the state is a party, to act as an attorney at law in an antitrust case, or to act as a prosecuting attorney in organized crime cases. Pet. App. 59a (Sutton, J., dissenting) (citing statutes).

In the same way, Michigan law repeatedly authorizes its Attorney General to delegate his authority to special counsel and to other persons. *Dearborn Fire Fighters Union, Local No. 412, I.A.F.F.* v. *City of Dearborn*, 231 N.W.2d 226, 261 (Mich. 1975) (recognizing that the Attorney General may "appoint a learned lawyer as a Special Assistant Attorney General" and that "[i]t would be difficult to say that that Special Assistant Attorney General was not a public officer").

Numerous state statutes recognize this. To give just a few examples, the Michigan Attorney General may:

(1) "employ counsel to be associated with him" "who, with him, shall fully represent the state" in actions to protect or assert the right or title of the state to property, Mich. Comp. Laws § 21.162;

(2) appoint a special prosecuting attorney to perform the duties of a prosecuting attorney who is disqualified or otherwise unable to serve, Mich. Comp. Laws § 49.160;

(3) designate "other person[s]" to conduct investigations, Mich. Comp. Laws § 400.291(2);

(4) appoint a "special assistant attorney general" to represent the insurance commissioner, Mich. Comp. Laws § 500.214(4);

(5) "assign an independent special assistant attorney general who is under contract to the department of attorney general and is not a member of the state classified civil service" to advise and assist disciplinary subcommittees under the Public Health Code, Mich. Comp. Laws § 333.16237(2); and

(6) appoint special counsel to represent an employee of the Friend of the Court, Mich. Comp. Laws § 691.1408; see also 1985–1986 Mich. Op. Att'y Gen. 72.

In many States, special counsel bring suits on behalf of the citizens of their States that would otherwise be impossible due to a lack of personnel resources, expertise, and money. Leah Godesky, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?*, 42 Colum. J. L. & Soc. Probs. 587, 588 (2009). As an example, Rhode Island's former Attorney General used private attorneys to represent that State in a fight against lead paint manufacturers. *Id.* at 589 (discussing *State* v. *Lead Indus. Ass'n Inc.*, 951 A.2d 428 (R.I. 2008)). As another, Oklahoma's former Attorney General similarly retained three plaintiffs' attorney firms to take on poultry companies he believed had polluted the State's waterways with chicken manure. *Id.* (discussing *State of Oklahoma ex rel The Pollution Control Coordinating Bd* v. *Kerr-McGee Corp*, 619 P.2d 858 (Okla. 1980)).

Ohio, Michigan, Oklahoma, and Rhode Island are not anomalies. At least 31 State Attorneys General have statutory authority to delegate their duties to special counsel. ALA. CODE § 36-26-42; ALASKA STAT. ANN. § 44.17.010; ARIZ. REV. STAT. ANN. § 41-192(A)(6); ARK. CODE ANN. § 25-16-702(b)(2); CAL. GOV'T CODE § 12520; CONN. GEN. STAT. ANN. § 3-125; DEL. CODE. ANN. tit. 29, § 2507; GA. CODE ANN. § 45-15-30; HAW. REV. STAT. ANN. § 28-8(b); IDAHO CODE ANN. § 67-1406(3); IOWA CODE ANN. § 13.7(1); LA. STAT. ANN. § 49:251.2; ME. REV. STAT. ANN. TIT. 5, § 191(3)(B); MD. CODE ANN. § 6-105(b)(1), (c)(1); MICH. COMP. LAWS §§ 14.29, 21.162, 333.16237(2); MISS. CODE ANN. § 7-5-7(2)(a); NEV. REV. STAT. ANN. § 41.03435; N.J. STAT. ANN. § 52:17A-13; N.Y. EXEC. LAW § 62(1); OHIO REV. CODE ANN. § 109.07; OKLA.

STAT. ANN. TIT. 74, § 20i(A)(3); OR. REV. STAT. ANN. § 180.235(1); 42 R.I. GEN. LAWS ANN. § 42-9-11, TENN. CODE ANN. § 8-6-106; TEX. BUS. & COMMERCE CODE ANN. § 15.40(b); UTAH CODE ANN. § 67-5-5; VT. STAT. ANN. TIT. 3, § 153(c); VA. CODE ANN. § 2.2-507(C); WASH. REV. CODE ANN. § 43.10.065; W VA. CODE ANN. § 5-3-2a(d); WYO. STAT. ANN. § 9-1-606(b). The widespread authority of Attorneys General to delegate their authority, and the benefits of state-officer status—whether in debt collection or in other areas—should not be diminished without a clear statement to the contrary.

D. The dissent's interpretation of "officer" is not a slippery slope that encompasses all who contract with the State.

The opinion below broadly proclaims that "[i]ndependent contractors are not officers under the plain language of the Dictionary Act." Pet. App. 43a. Of course, not all private contractors are state officers, nor would States want all of them to be. But the opinion's statement is incorrect because it leaves no room for the necessary analysis: whether the private contractor is "authorized by law" and is performing "the duties of the office." 1 U.S.C. § 1.

Compare two contractors: the State hires a groundskeeper to maintain the lawn by its capitol and also hires a special assistant attorney general to assist in major tobacco litigation. Both perform important work and add value to the State. But the former is not authorized by statute, his job tasks are not core state functions, and he is not subject to the same level of control and oversight as the Attorney General's delegate in court.

In the case of Ohio's special counsel, this control was exhibited in the use of Attorney General letterhead and the adoption of Attorney General protocols. Ohio special counsel *are*, contrary to the majority opinion, distinguishable "from the myriad of independent contractors who enter into for-profit agreements with government agencies or actors to help fulfill the duties of some government office." Pet App. 29a.

In analogous contexts, this Court has not treated all persons fulfilling some state task as officers of the State; instead, it has analyzed the nature of the relationship with the government. Consider questions of immunity. This Court has said that types of immunity (i.e., absolute versus qualified) "rest[] on functional categories, not on the status of the defendant." *Briscoe* v. *LaHue*, 460 U.S. 325, 342 (1983). And this Court has explained that private citizens may be entitled to immunity for actions taken while performing government operations. For example, grand jurors, though private citizens, have long enjoyed absolute immunity. *Imbler* v. *Pachtman*, 424 U.S. 409, 423 n.20 (1976).

Similarly, just three years ago this Court granted qualified immunity to a private attorney temporarily retained by a city to carry out its work. *Filarsky* v. *Delia*, 132 S. Ct. 1657, 1665 (2012). In determining that this non-city employee was entitled to protection from suit under § 1983, the Court noted that at the time Congress enacted § 1983 the common law did not distinguish between government employees and private actors serving the government. *Id.* at 1661-1665. Indeed, "[e]xamples of individuals receiving immunity

for actions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of the government itself'—from store owners acting as federal postmasters and private lawyers conducting criminal prosecutions on behalf of the State to individuals acting as part-time judges, justices of the peace, sheriffs, and constables. *Id.* at 1663-1665. In concluding that "immunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis," this Court explained that such immunity " 'protect[s] government's ability to perform its traditional functions,' " "ensur[es] that talented candidates are not deterred from public service," and avoids "significant line-drawing problems" that temporary relationships with the government might otherwise raise. *Id.* at 1665-1666 (citations omitted).

Of course, these immunities apply only to private citizens who are performing a government function and who meet the relevant legal tests. See *Filarsky*, 132 S. Ct. at 1669 (Sotomayor, J., concurring) ("[I]t does not follow that *every* private individual who works for the government in some capacity necessarily may claim qualified immunity Such individuals must satisfy our usual test for conferring immunity."). Lower courts applying *Filarsky*, for example, have certainly recognized this distinction. See, e.g., *Gomez* v. *Campbell-Ewald Co.*, 768 F.3d 871, 881(9th Cir. 2014) (refusing to extend *Filarsky* outside the personal-tort-liability context); *In re KBR, Inc., Burn Pit Litigation*, 744 F.3d 326, 344 (4th Cir. 2014) (refusing to extend *Filarsky* to sovereign-immunity issues or analysis of the Federal Tort Claims Act's discretionary-function exception). So too do only certain

private contractors function in a capacity that is "authorized by law" to fulfill "the duties of office." 1 U.S.C. § 1.

Relatedly, governmental tort immunity applies to only some contractors. Nuanced inquiries into the specific duties and authority of contractors are important to the applicability of governmental tort immunity, where agencies retain immunity for government or public acts but not for acts that are merely proprietary or private in nature. 57 AM JUR 2D *Tort Liability* § 38 (2015). For example, Michigan cannot be held liable in tort for operation of a state ferry as part of the State's highway system because it is a governmental function. *Manion* v. *State Highway Comm'r.*, 5 N.W. 2d 527, 529 (Mich. 1942); see also Mich. Comp. Laws § 691.1413. Similarly, Kentucky courts have recognized that the State's protection and conservation of game is a governmental function and the State is "acting in its sovereign capacity for the common benefit of all of its people." *Commonwealth* v. *Masden*, 175 S.W.2d 1004, 1006 (Ky. 1943) (citing *Nicoulin* v. *O'Brien*, 189 S.W. 724 (1916) (other citations omitted)).

Even applying common-law agency principles requires fact-intensive inquiries to determine whether a private contractor is functioning as an agent in the first place. See Restatement (Second) of Agency § 2 cmt. b (1958) (an "independent contractor" may be "an agent *under appropriate circumstances.*") (emphasis added). Likewise, this Court's Eleventh Amendment arm-of-the-state doctrine also employs a fact-intensive, multi-factored balancing approach in determining when to extend the State's sovereign immunity to

other entities. See, e.g., *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280 (1977) (explaining that arm-of-the-state inquiry depends, in part, "upon the nature of the entity created by state law" and determining that the local school board was more like a county or city than an arm of the State because it was subject to some guidance from the State Board of Education and received a significant amount of money from the State); *Port Auth. Trans-Hudson Corp.* v. *Feeney*, 110 S. Ct. 1868, 1876–77 (1990) (Brennan, J., concurring) ("[T]he entity [must be] "so intricately intertwined with" [and] so closely tied to the state as to be the direct means by which the state acts.").

In sum, the distinctions among independent contractors matter under the Dictionary Act just as they do under other relevant legal tests. Under the Act, it is important under what authority they were hired and under what authority and protocols they perform their work. And it matters what work they do. The Sixth Circuit closed the door on the "officer" inquiry without adequately considering these meaningful distinctions.

II. Congress has not clearly limited States' ability to benefit from the officer exception for private contractors assisting in debt collection, and States need such broad tools to effectively manage their debt collection.

States have the sovereign authority to collect the debts owed them. As the dissent recounts, "From the founding, the States have taken debts—whether owed by them or to them—seriously." Pet. App. 55a (Sutton, J., dissenting). The States' interest in debt collection

is no mere "policy concern," as the majority opinion characterized it. Pet. App. 28a–39a. Rather, it is an important piece of the States' sovereign right to govern themselves in the way that best solves problems and meets the needs of its citizens. State fiscal concerns should not be artificially separated from collecting revenue. And debt collection is an important factor in revenue-building.

A. In varying degrees, all States delegate some of their sovereign debt-collection power to non-employees.

Recently, the National Association of State Auditors, Comptrollers, and Treasurers, in conjunction with CGI, a leading information technology and business process services firm, conducted a survey in the hopes of helping States seek effective ways to raise needed revenue. *Government Debt Collection: Survey Report and Recommendations* 1 (2010), *available at* http://www.cgi.com/sites/default/files/pdf/CGI-NASACT-report.pdf. The survey showed that, regardless of the type of system they employ, *every* one of the 50 states surveyed said they were using private collection agencies to some degree and "at some point in the process." *Id.* at 3–5.

Michigan for example, relies on private collection agencies to collect debts owed to state agencies. The State centralizes its debt collection through an Office of Collections in its Department of Treasury. This centralized Office collects all overdue assessed taxes administered by the Michigan Department of Treasury and primary delinquent, non-tax debts owed to almost all state agencies. In total, over 200 different state agencies and local units of government have referred

debts to the Office of Collections, and the Office collects over 325 debt types. Even though the Office employs a staff of approximately 85, state law still authorizes the Department of Treasury to "contract with private collection agencies and law firms to collect taxes and other accounts due this state." 2014 Mich. Pub. Act 252, Part 2A, anticipated appropriations for fiscal year 2015-2016, Sec. 20-903(1), Department of Treasury, "Operations." Notably, the private company Michigan uses, GC Services Limited Partnership, explains that when it sends letters to individuals whose accounts have been referred for collection, it notifies them that it is operating "on behalf of the State of Michigan" and that its employees at the Michigan Accounts Receivable Collection System "are representatives of the Michigan Department of Treasury authorized to collect delinquent taxes owed to the State." (Appendix A, sample letter).

Like Michigan, other States also hire contractors to aid in their debt-collection efforts. Louisiana authorizes its centralized Office of Debt Recovery to "contract with a third-party collection contractor for the collection of delinquent debt on behalf of the office." LA. STAT. ANN. § 47:1676(C)(3). Colorado, which also has a centralized system, COLO. REV. STAT. 24-30-202.4, requires the state controller to "legally assign all debts that are not claims in process of collection to private counsel or private collection agencies" within 180 days. *Id.* at § 24-30-202.4(2). Similarly, Utah's centralized Office of Debt Collection is authorized to "contract with private or state agencies to collect past-due accounts." UTAH CODE ANN. 63A-3-502(4)(d).

While California has a quasi-centralized debt-collection system, it too relies on private contractors to fulfill its debt-collection duties. The California Franchise Tax Board is the state agency responsible for collection of state personal income tax and bank and corporation tax, and is authorized to hire private contractors for debt-collection purposes. CAL. REV. & TAX CODE §§19376–19378. Although private contractors may not hold themselves out to be Franchise Tax Board employees, they may, by contract, say they are collecting on behalf of the Franchise Tax Board. The Franchise Tax Board is also authorized to collect delinquent debts on behalf of state and local courts and on behalf of the Department of Motor Vehicles, as if those debts were a tax. CAL. REV. & TAX CODE § 19280, § 10878. The California State Controller's Office reports that personal income taxes, sales and use taxes, and corporate income taxes make up the State's General Fund—the State's main checking account to fund state agency programs and state funds to local government. California State Controller's Office, State Taxes, *available at* http://sco.ca.gov/.

States with decentralized systems use private contractors as well. See, e.g., OKLA. STAT. ANN. TIT. 68, § 205.2(b); OKLA. STAT. ANN. TIT. 68, § 255(A). But regardless of how they structure their debt-collection practices, States, as constitutional sovereigns, should retain the flexibility to decide for themselves whether to appoint private contractors to complete the core task of debt collection.

B. Many States authorize their Attorney General to hire private individuals to assist in debt collection.

Like Ohio, many States authorize their Attorneys General to delegate their debt-collection authority. E.g. ALA. CODE § 40-2-11(4); ALASKA STAT. ANN. § 43.10.010(b); ARIZ. REV. STAT. ANN. § 41-191(E); ARK. CODE ANN. § 25-16-708a; CONN. GEN. STAT. ANN. § 4a-12(b); DEL. CODE ANN. tit. 6, § 2432A; GA. CODE ANN. § 10-1-382(a); KAN. STAT. ANN. § 20-379(c)(5); MISS. CODE ANN. § 7-5-7(2)(a); N.J. STAT. ANN. § 52:18-37; OHIO REV. CODE ANN. § 131.02; PA. STAT. AND CONS. STAT. ANN. § 732-204(c); TEX. GOVT. CODE ANN. § 2107.003. The complexity of state taxing structures and the need for robust state tax-collection programs underscore why States may need the flexibility to hire private contractors and to claim the state-officer exemption under the FDCPA.

States' debt-collection systems often reflect the complexity of their taxing structure. Consider Michigan. Between 2011 and 2014, Michigan reported collecting over 31 types of state taxes—taxes as diverse as casino gaming, oil and gas severance, horse-race wagering, liquor markup, property taxes, state education taxes, and airport parking excise taxes. Citizens Research Council of Michigan, Outline of the Michigan Tax System 85.[1] That number represents a dramatic increase from the 22 types of taxes reported during the years 1993–1996. *Outline of the Michigan Tax*

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[1] *Available at* http://crcmich.org/PUBLICAT/2010s/2015/ Tax %20Outline_ALL.pdf.

System, Report No. 322.[2] Increasing complexity demands state ingenuity and flexible tools.

In addition to their complexity, state tax structures are often in flux as state policy shifts and evolves. Michigan, for example, has in recent decades seen a shift from local taxation to state-level taxation in financing the State's K-12 school system.[3] The State has also expanded its own tax system through increased sales tax and a new real estate transfer tax. Michigan, as well as all States, must have the tools to keep pace with the changing tax landscape.

Why does this matter? In large part it matters because States must safeguard their fiscal health. States continue to face the repercussions of the recent economic downturn. Sarah Arnett, *State Fiscal Condition: Ranking the 50 States* 3 (Mercatus Center at George Mason University, Working Paper No. 14-02, 2014). Fiscal simulations by the Government Accountability Office, an independent agency that provides Congress with audit, evaluation, and investigative services, suggest concern for the long-term outlook for States' fiscal condition. (*Id.*, citing GAO 2013). States need revenue, and revenue is tied to effective debt collection.

Not surprisingly then, the National Association of State Auditors, Comptrollers and Treasurers has rec-

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[2] *Available at* http://www.crcmich.org/PUBLICAT/1990s/1997/rpt322.pdf.

[3] *Available at* http://crcmich.org/PUBLICAT/2010s/2015/Tax_Outline_ALL.pdf.

ommended that States must aggressively explore better ways to increase efficiency and raise revenue to maintain citizen services. *Government Debt Collection: Survey Report and Recommendations* 11. Its survey report observed that enhancing debt-collection tools and capabilities would likely increase revenues "by scores of millions of dollars each year." *Id.* In fact, according to the survey, a number of States are "considering expanding their delinquent debt collection programs to increase revenue from their accounts receivable as part of a balanced program for getting into, and staying in, fiscal shape." *Id.*

There are good reasons why robust state debt-collection programs are linked to increased revenue. First, robust enforcement discourages nonpayment of taxes. Most state tax systems are based on voluntary compliance by taxpayers, so enforcement is a necessary activity to recover tax receivables and keep voluntary reporting and payment from decreasing. If the State is viewed as being lax on enforcement, voluntary-compliance numbers are almost certain to drop. Second, robust enforcement reduces the tax burden for the millions of individual citizens and businesses who *do* comply with the tax laws. Third, robust enforcement benefits tax-paying businesses through minimization of the unfair competitive advantage gained by businesses that do not pay their taxes.

But innovative and robust efforts to collect debts often require increased state intervention. This, in turn, is likely to require the assistance of private contractors.

Whether in debt collection or beyond, States need the flexibility to use private contractors. Their decision to do so may depend on whether they can derive the benefits and protections available from federal statutes such as the FDCPA.

CONCLUSION

For these reasons, the Court should reverse the decision below.

Respectfully submitted,

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APPENDIX A

MICHIGAN
ACCOUNTS RECEIVABLE COLLECTION SYSTEM
POST OFFICE BOX 30158
LANSING, MICHIGAN 48909

Date: December 8, 2014
Account No:
Contact Telephone No:
1-866-754-8649

Your account has been referred to the Michigan Accounts Receivable Collection System (MARCS), which is operated on behalf of the State of Michigan by GC Services Limited Partnership, a private debt collection company. GC Services Limited Partnership employees at the Michigan Accounts Receivable Collection System (MARCS) site are representatives of the Michigan Department of Treasury authorized to collect delinquent taxes owed to the State. **To avoid further collection activity, send your payment in full along with a copy of the State's notice in the enclosed envelope immediately.**

You have previously received a final demand letter from the Michigan Department of Treasury summarizing your account. If you have questions about your account, you should call the number listed above. This is an attempt to collect amounts due to the State and any information obtained will be used by GC Services Limited Partnership, only for that purpose.

For your convenience, you can now pay on the web at no additional charge by going to www.michigan.gov/collectionseservice

LT-91P-B (Rev. 09/13)
Letter G-1091 (MARCS)

Enclosures:
Attachment
Envelope

No. 15-338

In the Supreme Court of the United States

MARK J. SHERIFF, *et al.*

Petitioners,

v.

PAMELA GILLIE AND HAZEL MEADOWS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF NATIONAL CONSUMER LAW CENTER, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, AND PUBLIC GOOD LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTRODUCTION AND SUMMARY OF ARGUMENT

This brief, by three consumer-advocacy groups, addresses the second question presented: whether private debt collectors enlisted by Ohio's Attorney General as "collections special counsel" violated the Fair Debt Collection Practices Act by sending collection letters to Ohio consumers on Attorney General letterhead.[1]

If the Court reaches this question, it should decline the petitioners' invitation to create an extratextual "materiality" requirement. That issue is not implicated here: The letters constituted per se violations of two specific FDCPA prohibitions. Congress expressly concluded that this conduct "is a violation" of the FDCPA. 15 U.S.C. § 1692e. The Court therefore need not address whether materiality might be required in a different, hypothetical case.

The Court should also decline to entertain the petitioners' proposal to adopt an "average consumer" standard—an argument neither presented nor passed on below, nor even mentioned in the petition for certiorari. The petitioners give no content to their proposed standard, which has not been adopted by any court. Over the last three decades, the lower courts have consistently employed a "least-sophisticated consumer" standard in FDCPA cases. There is no reason for this Court to depart from that settled consensus now. Quite the contrary: Given the empirical evidence showing low financial-literacy levels among U.S. consumers, ensuring the continued use of the least-sophisticated-consumer standard is essential to vindicating the Act's purposes.

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[1] All parties consent to this brief, and no party's counsel authored it in whole or part. Apart from *amici*, no person contributed money to fund its preparation or submission.

INTEREST OF *AMICI CURIAE*

National Consumer Law Center (NCLC) is a nonprofit research and advocacy organization focusing on the legal needs of consumers—especially low-income and elderly consumers. For over 45 years, NCLC has been the consumer-law resource center to which state and federal consumer-protection officials, advocates, public policy makers, reporters, and community groups have turned for legal answers, policy analysis, and technical and legal support. NCLC is recognized nationally as an expert in fair-debt-collection issues and is the author of *Fair Debt Collection* (8th ed. 2014), a comprehensive treatise on which this Court has relied. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 591 n.12 (2010).

National Association of Consumer Advocates (NACA) is a nonprofit corporation whose members are lawyers, law professors, and students whose practice or area of study involves consumer protection. NACA's mission is to promote justice for consumers by maintaining a forum for information sharing among consumer advocates and to serve as a voice for its members and consumers in the struggle to curb unfair and oppressive business practices. Compliance with the FDCPA has been a continuing focus of NACA since its inception.

Public Good Law Center is a public-interest organization dedicated to the proposition that all are equal before the law. Through *amicus* participation in cases of particular significance for consumer protection and civil rights, Public Good seeks to ensure that the law remains available to everyone. Public Good has been particularly involved in cases involving unfair debt-collection practices, including instances of deceptive use of the trappings of government agencies.

STATEMENT

Respondents Pamela Gillie and Hazel Meadows received similar debt-collection letters, which bore the State of Ohio's seal and represented that they were from the Office of the Ohio Attorney General. They were both "alarmed" by these letters; Meadows in particular was "scared that the Ohio Attorney General might charge [her] with a crime for not paying what he said [she] owed." JA 43–45, 139. But the letters had actually been sent by special counsel—private lawyers that the State of Ohio enlists to collect debts. *See* Pet. App. 22a–26a.

Gillie and Meadows brought a putative class action against the special counsel, alleging that their use of Attorney General letterhead violated specific prohibitions set forth in section 1692e of the FDCPA. In particular, they alleged that the letters violated the Act's prohibitions on "[t]he use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval," 15 U.S.C. § 1692e(9); and "[t]he use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization," *id.* § 1692e(14).

Holding that they were not "debt collectors" under the FDCPA, the district court granted special counsel's motion for summary judgment. In the alternative, the court concluded that the letters did not violate section 1692e because "the least sophisticated consumer would not be materially misled." Pet. App. 96a.

The Sixth Circuit reversed on both grounds. With respect to liability under section 1692e, the Sixth Circuit (like the district court) asked whether "the least sophisticated consumer" would be confused by the letters. Pet.

App. 48a. Noting that "[t]he use of the letterhead has no apparent purpose beyond misleading a consumer into believing it is the Attorney General who is collecting on the account," the court held that "a jury could reasonably find that special counsel's use of the letterhead is confusing; and therefore a violation of § 1692e." Pet. App. 46a, 54a. The Sixth Circuit remanded the case for a jury trial.

ARGUMENT

I. Because the petitioners committed per se violations of the FDCPA, this Court need not address whether materiality may be required under different circumstances.

The respondents allege that special counsel's use of Attorney General letterhead violated two provisions of the FDCPA: section 1692e(9)'s prohibition against sending a communication that "simulates a document issued" by "any State" or "creates a false impression as to its source," and section 1692e(14)'s requirement that a communication use only "the true name of the debt collector's business." There is enough evidence in the record for a jury to agree. As the Sixth Circuit observed, "[t]here is no compelling reason for special counsel to use the [Attorney General] letterhead, other than to misrepresent their authority and place pressure on those individuals receiving the letters." Pet. App. 45a. And the petitioners themselves have all but conceded that the letters violate both subsections' plain terms. *See* Resp. Br. 40–47. That should be the end of the analysis: Under the FDCPA, a violation of either subsection constitutes "a violation of [section 1692e]." 15 U.S.C. § 1692e.

Eschewing this straightforward analysis, the petitioners ask the Court to write into the statute an additional requirement that is nowhere to be found in the text. To establish a section 1692e violation, they contend, it is not enough for plaintiffs to prove that the defendant

engaged in conduct that Congress said "is a violation of" the statute. *Id.* They must also prove that the communications were "materially misleading." Pet. Br. 39; *see also id.* at 43–44. The petitioners derive this asserted materiality requirement from section 1692e's general catch-all provision: that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. On their reading, the "false, deceptive, or misleading" language incorporates a background principle of materiality that extends to cover other provisions beyond the catch-all, including those that Congress deemed per se violations of the statute. Pet. Br. 39, 43.

This Court should reject that reading. For starters, it is doubtful that Congress intended to silently import into the FDCPA *any* common-law concept of materiality, even with respect to the catch-all provision. As this Court has cautioned, when a statute does not "so much as mention materiality"—as is the case with the FDCPA—"a natural reading of the full text" suggests that "materiality would not be an element." *United States v. Wells*, 519 U.S. 482, 490 (1997). Absent clear evidence to the contrary, this Court should refrain from injecting an extratextual materiality requirement into the statute. *See also* Resp. Br. 50–51.

In any event, whether Congress intended to cabin the general catch-all provision by an unexpressed materiality requirement is not at issue here. The respondents allege that special counsel violated the law's *specific* prohibitions set forth in subsections (9) and (14)—not the catch-all provision. And Congress expressly concluded that any conduct described in those subsections "is a violation of this section." 15 U.S.C. § 1692e. Congress did not mention materiality in either subsection, directly or indirectly, and the petitioners do not contend that it did.

Instead, they make an appeal to the congressional policies behind the Act, arguing (at 43) that "[a] materiality element furthers the Act's purposes" by protecting "conscientious debt collectors" from liability. But, by spelling out specific conduct as per se unlawful, Congress determined that this conduct—including the conduct specified in subsections (9) and (14)—is necessarily harmful to consumers. Put differently, debt collectors who engage in such practices are, in Congress's judgment, inherently *not* "conscientious."

The question here, then, is whether the allegedly unlawful conduct matches that proscribed by subsection (9) or (14). If so, the petitioners have violated the FDCPA. That is true irrespective of whether the Act's catch-all language is limited by a materiality requirement. So this Court need not—and therefore should not—decide the hypothetical question whether materiality would be required in a different case. It should instead hold that a per se violation is what Congress said it is: "a violation of this section." 15 U.S.C. § 1692e; *see Warren v. Sessoms & Rogers P.A.*, 676 F.3d 365, 374 (4th Cir. 2012) ("[W]hether a materiality requirement attaches to other violations of § 1692e has no impact on [the plaintiffs'] allegations that the defendants violated [a specific subsection of § 1692e]."), *abrogated on other grounds by Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016).

Contrary to the petitioners' claim, a plain-text reading would not allow the FDCPA to reach "any technical falsehood." Pet. Br. 44. Unlike the petitioners' proposed "materiality" requirement, the Act already contains an *express* limitation on liability, demanding that any representation be made "in connection with the collection of any debt." 15 U.S.C. § 1692e. Courts have held that this language restricts liability to those communications that have the "animating purpose" of "induc[ing] payment by the debtor" or that "aim[] to make a [debt-collection]

attempt more likely to succeed." *Grden v. Leikin Ingber & Winters PC*, 643 F.3d 169, 173 (6th Cir. 2011). Given this language—and the specific language that Congress used in crafting the per se violations—there is simply no need for this Court, in this case, to judicially impose an extratextual limitation for policy reasons.

II. This Court should not entertain the petitioners' proposal to adopt a new "average consumer" test.

A. The petitioners not only seek the creation of a new materiality requirement, they also ask this Court to adopt a new liability standard for deceptive conduct under the Act—their so-called "average consumer" test. Pet. Br. 41. The Court should decline the request. The petitioners appear to have invented that test only after this Court granted certiorari. They did not mention it in their petition or reply brief, nor did they discuss it in their briefing below. And neither the panel opinion nor the dissent says anything about such a test.

Indeed, in seeking certiorari, the petitioners urged this Court to resolve an asserted "circuit split" that had (in their words) created "conflicting tests for assessing whether debtors would find a statement misleading: the 'least sophisticated consumer' test and the 'unsophisticated consumer' test." Pet. for Cert. 24; Reply 10. To induce this Court to grant review, the petitioners signaled that they were prepared to advocate for the second test, arguing that, under that test, the letters are not misleading. Pet. for Cert. 28.

Now that this Court has granted certiorari, the petitioners instead purport to advance a third test: "one asking whether an *average consumer*" in the relevant market would be misled. Pet. Br. 41. But the only case the petitioners cite to support their test does no such thing. Specifically, that case says that the standard focuses on "the average consumer *in the lowest quartile*

(or some other substantial *bottom fraction*) of consumer competence." *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 774 (7th Cir. 2007) (emphasis added). The standard, in other words, focuses on "consumers of below-average sophistication." *Clomon v. Jackson*, 988 F.2d 1314, 1319 (2d Cir. 1993). No circuit has held otherwise.

The petitioners do not flesh out the contours of their proposed test, but under any plausible iteration it should be rejected here. On the one hand, if the "average consumer" test sets a meaningfully higher bar than the tests argued below, the petitioners have waived the argument. "[T]his is a court of final review and not first view." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam). It "does not ordinarily decide questions that were not passed on below." *City & Cnty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1773 (2015); *see also United States v. Williams*, 504 U.S. 36, 41 (1992). Doing so in this case would be especially inappropriate because the precise liability standard is irrelevant: The respondents are not relying on the catch-all provision. And even if determining whether a letter "creates a false impression as to its source" (under subsection (9)) were to require the application of a liability standard, determining whether the debt collector used a "name other than [its] true name" (under subsection (14)) does not.

If, on the other hand, the petitioners' "average consumer" test is not meaningfully different from the standards argued below, then they are simply playing a "semantics game." Pet. for Cert. 27. Although they ask this Court to "reject" the least-sophisticated-consumer standard, complaining that it "misleads" and "lacks any historical pedigree," they do not identify what exactly is wrong with how the standard is applied by lower courts. Pet. Br. 42. To the contrary, they concede that the standard "reject[s] liability 'for bizarre or idiosyncratic

interpretations.'" *Id.* (quoting *Wilson v. Quadramed Corp.*, 225 F.3d 350, 354–55 (3d Cir. 2000)). And even the courts that have adopted the unsophisticated-consumer test (rather than the least-sophisticated-consumer test) have acknowledged that the difference between the two formulations is merely one of "[l]abels," *Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98, 103 n.4 (1st Cir. 2014), with no "practical difference in application," *Avila v. Rubin*, 84 F.3d 222, 227 (7th Cir. 1996); *see also Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1061 n.2 (9th Cir. 2011) (noting that the two tests differ "only in semantics").

Once the semantics are set aside, the petitioners' position is exposed as nothing more than a factbound, case-specific plea for this Court to address an alleged "misapplication of a properly stated rule of law." Sup. Ct. R. 10. Had that been made clear in the petition, this Court may well have denied review on the second question. But as it is, the Court should make clear (if it reaches the issue) that liability under the FDCPA is assessed from the standpoint of the "unsophisticated" or "least sophisticated" consumer—not the average consumer.

B. For more than 30 years, the lower courts have consistently held that the relevant standard under the FDCPA takes the perspective of an unsophisticated or least-sophisticated consumer. *See Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985). This standard "protects all consumers, the gullible as well as the shrewd the ignorant, the unthinking and the credulous." *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1171 (9th Cir. 2006). It "does not rely on assumptions about the 'average' or 'normal' consumer." *Clomon*, 988 F.2d at 1319.

Today, that is the rule in every circuit.[2] And for good reason: When Congress enacted the FDCPA, it did so because it found that "[e]xisting laws and procedures" were "inadequate to protect consumers." 15 U.S.C. § 1692(b). As the Eleventh Circuit long ago explained, "[i]t would be anomalous for the Congress, in light of its belief that existing state and federal law was inadequate to protect consumers, to have intended that the legal standard under the FDCPA be *less* protective of consumers than under the existing 'inadequate' legislation." *Jeter*, 760 F.2d at 1173–74 (emphasis in original). Despite multiple amendments to the FDCPA over the last few decades, Congress has never acted to disturb this bedrock rule. This Court should not do so either.

The prevailing standard has not only proved workable over time but also reflects contemporary realities. Nearly half of American consumers read at no more than an eighth-grade level. Gov't Accountability Office, *Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosure to Consumers*,

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[2] Most circuits use the "least sophisticated consumer" language. *See, e.g.*, *Clomon*, 988 F.2d at 1318–19 (2d Cir.); *Campuzano-Burgos v. Midland Credit Mgmt., Inc.*, 550 F.3d 294, 298 (3d Cir. 2008); *United States v. Nat'l Fin. Servs., Inc.*, 98 F.3d 131, 136–37 (4th Cir. 1996); *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232, 1236 (5th Cir. 1997); *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1028 (6th Cir. 1992); *Clark*, 460 F.3d at 1171 (9th Cir.); *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1193 (11th Cir. 2010). The First, Seventh, and Eighth Circuits use the "unsophisticated consumer" language. *Pollard*, 766 F.3d at 103–04 (1st Cir.); *Gammon v. GC Servs. Ltd. P'ship*, 27 F.3d 1254, 1257 (7th Cir. 1994); *Peters v. Gen. Serv. Bureau, Inc.*, 277 F.3d 1051, 1055 (8th Cir. 2002). However labeled, these standards are "designed to protect consumers of below average sophistication or intelligence," while still "contain[ing] an objective element of reasonableness." *Peters*, 277 F.3d 1051 at 1055.

GAO-06-929, at 38 (2006); *see also* Lowenstein, Sunstein & Golman, *Disclosure: Psychology Changes Everything*, Annual Rev. of Econ. 21–29 (Harvard Pub. Law Working Paper No. 13-30 Aug. 18, 2013). And "research measuring the literacy of the U.S. population demonstrates that even consumers who might take the time and trouble to 'read' contemporary consumer contract documents are unlikely to understand them." White & Mansfield, *Literacy and Contract*, 13 Stan. L. & Pol'y Rev. 233, 234 (2002). Indeed, some studies have found that "about half of the American adult population could not be expected to consistently extract information from lists, forms, tables, and similar documents [that] are less complex than many modern consumer contract forms." *Id.* at 237.

These basic deficiencies are magnified in the consumer-finance context, because "[t]he evidence indicates that financial literacy levels among U.S. consumers are low." Boedecker & Lucas, *Consumer Behavior and the Regulation of Consumer Financial Services*, Economics, Law, and International Business, Paper 2 (2009), http://repository.usfca.edu/elib/2/, at 20.[3] A National Bureau of Economic Research study, for example, found "strikingly low levels of debt literacy across the U.S. population"; only one-third of respondents could answer basic questions measuring financial knowledge related to debt. Lusardi & Tufano, *Debt Literacy, Financial Experiences, and Overindebtedness*, Nat'l Bureau of Econ.

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[3] *See also* Dinwoodie, *Ignorance Is Not Bliss: Financial Illiteracy, the Mortgage Market Collapse, and the Global Economic Crisis*, 18 U. Miami Bus. L. Rev. 181, 184–85 (2010); Lusardi & Mitchell, *Financial Literacy and Retirement Preparedness: Evidence and Implications for Financial Education*, 42 Bus. Econ. 35, 36–37 (Jan. 2007) ("[A]ctual financial knowledge was sorely deficient for both high school students and working-age adults.").

Res. (March 2009), http://www.nber.org/papers/w14808, at 1, 5–8. Yet many groups, "like the elderly, *think* they know considerably more than they actually do," which "may help explain the incidence of financial frauds perpetuated against [them]." *Id.* at 24. The evidence, the authors concluded, "provides some reason for concern in an economy in which consumers routinely borrow and save using debt-like instruments." *Id.* at 8.

In light of this empirical evidence, the Court should refrain from disturbing the settled consensus on the least-sophisticated-consumer standard. When it enacted the FDCPA, Congress was aware that private debt collectors—who are typically paid on commission—have every incentive to exploit consumers' deficiencies by "press[ing] the boundaries of the Act's prohibitions on collection techniques." *Jerman*, 559 U.S. at 602; *see also* S. Rep. No. 95–382, at 2. Departing from the standard that has prevailed for the last 30 years, as the petitioners propose, would only encourage debt collectors to press those boundaries further still—the very opposite of what Congress intended.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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No. 15-338

In THE

Supreme Court of the United States

MARK J. SHERIFF, ET AL.,

Petitioners,

v.

PAMELA GILLIE AND HAZEL MEADOWS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NHS CONSUMER LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Are the collections special counsel "officers" of the State within the meaning of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. 1692a(6)(C)?

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INTEREST OF THE *AMICUS CURIAE*[1]

The NHS Consumer Law Center was launched in 2012 by the Neighborhood Housing Services of Greater Cleveland (the "NHSGC"), a not-for-profit organization committed to helping the citizens of Ohio, in particular those with low-to-moderate incomes, achieve the dream of home ownership. The NHSGC offers consumers and families in Ohio a range of programs and services, including financial capability counseling, foreclosure assistance, pre-loan reverse mortgage counseling, and various other forms of related assistance.

To further the NHSGC's broader aim of empowering Ohio consumers, the NHS Consumer Law Center provides these consumers with the information they need to make informed and financially responsible decisions en route to home ownership. Among other measures, the NHS Consumer Law Center runs public awareness campaigns, disseminates educational materials, hosts blogs dedicated to consumer issues, and conducts seminars on the legal rights of consumers and debtors.

One of the Consumer Law Center's principal aims is to help consumers avoid predatory, abusive,

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[1] Pursuant to Supreme Court Rule 37.3, counsel of record of all parties received timely notice of *amicus* NHS Consumer Law Center's intent to file this brief and have consented to its filing. No counsel for a party authored this brief in whole or in part and no person or entity other than the *amicus* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

or fraudulent debt collection practices. The FDCPA, 15 U.S.C. § 1692 *et seq.*, has long been a bulwark against such practices. Conceived to "eliminate abusive debt collection practices by debt collectors" and "promote consistent State action to protect consumers against debt collection abuses," the FDCPA proscribes a range of deceptive and unfair practices by "debt collectors." 15 U.S.C. § 1692.

The Ohio Attorney General advances an implausible reading of the term "debt collector" that threatens to eviscerate the FDCPA and hurt consumers, including the Consumer Law Center's clients. The Attorney General hopes to exempt the collections special counsel—ordinary third-party debt collectors who have been known to engage in abusive practices—from FDCPA coverage simply because they have entered into contractual agreements with the Attorney General. If this dangerous interpretation of the FDCPA were adopted, it would threaten to perpetuate further abuse in Ohio—and potentially across the country. As part of its responsibility to its clients and in furtherance of its mission, the NHS Consumer Law Center has an interest in fighting this erosion of consumer and debtor rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the FDCPA to protect "the least sophisticated consumer" from a range of "abusive ... debt collection practices by many debt collectors." *See Harvey v. Great Seneca Fin. Corp.*,

453 F.3d 324, 329 (6th Cir. 2006). This case presents an opportunity to ensure that vulnerable consumers in Ohio continue to enjoy the protections of the FDCPA, as Congress intended, and that the purpose of the statute is not undermined by a misguided interpretation of the term "officer" that bears little relation to the reality on the ground in Ohio.

The Office of the Ohio Attorney General (the "Attorney General") and other Petitioners argue that certain private debt collectors, known as the "collections special counsel," should be exempt from the FDCPA's restrictions because they are not "debt collectors" within the meaning of the statute. In so arguing, the Attorney General cites section 1692a(6)(C), which exempts from the scope of the FDCPA "any officer or employee of any State to the extent collecting or attempting to collect any debt is in the performance of his official duties." This provision is inapposite, however.

Many of the collections special counsel collect debts for a host of entities, both public and private, on a regular basis. Far from being officers of the state, they are ordinary debt collectors impelled by the profit motive and engaged in the business of collections for any client with whom they have a contractual relationship. In short, they are the exact class of persons whose conduct the FDCPA is meant to regulate. *See* 15 U.S.C. § 1692a(6) (explaining that "debt collector" includes anyone "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.") The Sixth Circuit correctly recognized this fact. *See, e.g.*, Pet. App. 29, 42, 43 ("Special

counsel are, simply, as their contract with the Attorney General states, independent contractors.").

Not only are the collections special counsel virtually indistinguishable from run-of-the-mill debt collectors in their day-to-day business, but also the methods they employ in conducting this business are similar to those of other independent contractors in the collections business. Indeed, the collections special counsel have been found to engage in FDCPA-proscribed tactics such as seeking payments from consumers who do not owe any debt, sending false debt collection notices misrepresenting the amounts and legal basis of debts owed, pursuing assets exempt from debt collection, and levying usurious fees on the basis of statutory interpretations that courts have found to be without merit.

Congress did not intend consumers confronted with such abusive practices to be without the protections afforded by the FDCPA. Indeed, ruling that the collections special counsel are "officers" of the State would risk perpetuating and worsening these types of abuses. Moreover, such a ruling could foster greater lawlessness in the debt collection arena by encouraging the expansion of Ohio's special counsel program, both nationally and to non-attorneys. The unsophisticated consumers Congress intended to protect in Ohio and beyond deserve better.

The Court should affirm the decision of the Court of Appeals.

ARGUMENT

I. The Collections Special Counsel Are Ordinary Outside Debt Collectors Subject to the FDCPA

A. The Collections Special Counsel Collect Debts on Behalf of Entities Public and Private

The FDCPA defines a "debt collector" as anyone "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). The collections special counsel fall squarely within this definition and regularly enter into contracts with private entities to collect debts on their behalf. For instance, the website for the firm of petitioner Eric A. Jones states that the firm provides "high-quality, professional legal services focused on debt collection and related legal issues." Debt Collection, Jones Law Group, LLC, http://tinyurl.com/hg8kjcp (last visited Feb. 25, 2016). Indeed, the firm touts its debt collection experience, stating "[w]e are the preferred attorney-managed debt recovery solution for a significant number of businesses and organizations in Ohio. Our firm represents business owners, entrepreneurs, debt buyers, and other clients who need to recover money owed to them through the legal process." *Id.*

Furthermore, in his Request for Qualifications for Special Counsel, the Attorney General acknowledges that the collections special counsel are involved in the general business of debt collection and finds this desirable, explaining that "[i]n

particular, the Attorney General seeks attorneys with experience in general collections, the securing of judgments, and post-judgment enforcement, along with those who have experience representing creditors in bankruptcy matters." Request for Qualifications for Collections Special Counsel, Ohio Attorney General's Office, http://tinyurl.com/zczoxdx (last visited Feb. 25, 2016); *see, e.g.*, JA 210.[2]

In short, the collections special counsel are merely lawyers who pursue debt, whether public or private. Inasmuch as they are not officers of the private companies with which they enter into contracts of fixed duration to collect debt in return

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[2] There are indications that financial concerns may modulate the preference for experience that the Request for Qualifications would suggest. The Dayton Daily News spotlighted one notable instance in which a politically connected contributor with no prior debt collection experience beat out more experienced debt collection firms. Laura A. Bischoff, *Vendors Gave Big to DeWine, GOP: Ohio AG Denies Politics Played a Role in Awarding Lucrative Collections Contracts*, DAYTON DAILY NEWS (Jul. 19, 2014, 12:00 AM), http://tinyurl.com/zs4sono. The paper reported that, in April 2012, CELCO Ltd., a debt collection firm that had been formed two days before the Attorney General issued Requests for Qualifications, edged out a number of firms that had decades of experience, national footprints, and licenses to collect outside Ohio. *Id.* The Dayton Daily News reported that the founder of CELCO Ltd. and his relatives had contributed $35,000 to the Ohio Republican Party and $23,000 to the Summit County GOP, which in turn donated $405,500 to the Attorney General's campaign between 2010 and 2014. *Id.* Significantly, Ohio law prohibits a "state elected officer" from "accept[ing] a contribution" from a "state employee" he appoints, where the term "state employee" is defined broadly to cover "any person holding a position subject to appointment by an appointing officer. OHIO REV. CODE ANN. §§ 124.01, 3517.092.

for lucrative commissions, they should not be deemed officers of the state for which they render identical contract-based services.

B. The Collections Special Counsel's Debt Collection Practices Are Identical to Those of Outside Debt Collectors

The collections special counsel have been known to employ the same tactics and dishonest methods of debt collection used by run-of-the mill third-party debt collectors. Medicaid estate recovery and student loan debt claims are just two areas replete with examples of egregious behavior by the collections special counsel.

1. The Collections Special Counsel File Misleading Notices and Assert Liens Against Assets Exempt as a Matter of Law

In keeping with federal statutes, Ohio's Medicaid Estate Recovery program allows the state to seek repayment for the cost of Medicaid benefits after the Medicaid recipient is deceased. Under both the state and federal statutes authorizing liens against an estate to recoup Medicaid benefits after the recipient is deceased, the state can seek recovery only after the recipient's surviving spouse has died. Indeed, the federal statute states that "[a]ny adjustment or recovery ... may be made only after the death of the individual's surviving spouse," among other restrictions. *See* 42 U.S.C. § 1396p(b)(2). Mirroring the federal statute, Ohio's statute authorizing recovery of Medicaid benefits from estates provides that, "[n]o adjustment or recovery may be made ...

from a permanently institutionalized individual's estate or on the sale of property of a permanently institutionalized individual that is subject to a lien ... while either of the following are alive: (a) The spouse of the permanently institutionalized individual or individual." OHIO REV. CODE ANN.§ 5162.21(C)(1)(a).

Despite this clear statutory limitation, the collections special counsel have been known to file Affidavits of Fact Relating to Title under OHIO REV. CODE ANN.§ 5301.252 against residences owned by the spouses of deceased Medicaid recipients while these spouses are still alive. *See, e.g.*, No. 15-0078598, Affidavit of Fact Relating to Title (Jul. 28, 2015). These practices occur despite the fact that Ohio law provides that Affidavits of Fact Relating to Title are appropriate only for "facts relating to the matters ... that may affect the title to real estate in this state." OHIO REV. CODE ANN. § 5301.252(A). These Affidavits can have the effect of putting a cloud on the title of the residences in question. At the very least, they can induce the seniors who receive them to pay amounts they absolutely do not owe under the law. The collections special counsel have also sent notices to spouses falsely stating that the Medicaid claims are deferred until the spouses no longer reside at the residence, rather than until the spouse's death. *Id.* at 1. Some of these notices have also falsely stated that the Medicaid claims would become enforceable "upon the attempted sale or transfer of the property." *Id.* These statements have no basis in the law and are, in fact, untrue.

Furthermore, the collections special counsel seeking payment of Medicaid recovery amounts have pursued assets that are exempt from recovery as a matter of law. The Ohio Medicaid estate recovery statute provides that any applicable lien attaches only to property that the Medicaid recipient owned at the time of death. *See id.* § 5162.21(A)(1)(b) (defining "estate" as "[a]ny other real and personal property and other assets in which an individual had any legal title or interest at the time of death (to the extent of the interest)."). Nonetheless, the collections special counsel seeking to recover Medicaid benefits after recipients' deaths have been known to file Affidavits of Fact against assets owned solely by the spouses of the Medicaid recipients at the time of the recipients' death.

Apart from the fact that the collections special counsel have been known to misstate the law in these Affidavits and proceed against assets from which the state cannot seek collection, there is also a coercive element to their conduct that mirrors that of run-of-the-mill debt collectors. In some cases, the elderly spouses have learned of the Affidavits wrongly filed against their assets only shortly before closing on sales of these assets. The high pressure setting of a closing, in which there is little time to spare for a challenge and the parties are anxious, increases the likelihood that the spouses will pay in full or settle these baseless claims. Title examiners have also required claims to be paid from the proceeds of sales in order for closings to proceed. The fact that these Affidavits are accompanied by letters printed on the Attorney General's letterhead

only adds to the intimidation and further confuses people as to the veracity of debt.

These coercive and misleading practices are the exact types of tactics that outside debt collectors have long used and that the FDCPA was meant to address. *See generally* S. Rep. No. 95-382 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695.

2. The Collections Special Counsel Levy Extremely High Fees with Questionable Statutory Authorization

The collections special counsel have been known to charge extremely high fees on top of the principal of the debts being collected. For instance, in *Client Security Fund of Ohio v. Broschak*, the collection fees assessed were almost equal to the principal—$22,433.90 on a principal of $28,500.00. *See* No. 12CVH-09-11545, Magistrate's Decision on Damages (Franklin Cty. C.P. Ohio Civ. Div. Nov. 15, 2013), *aff'd* No. 12CVH-09-11545, Judgment Entry (Franklin Cty. C.P. Ohio Civ. Div. Feb. 4, 2014). There was no attempt to relate the fees to any costs of collection and the fees were assessed as an arbitrary percentage of the principal. *See id.* at 2; *see also Bradley v. Franklin Collection Serv., Inc.*, 739 F.3d 606, 609 (11th Cir. 2014) (holding that debt collectors may not under the FDCPA "charge[ ] the debtor a collection fee based on a percentage of the principal balance of the debt due rather than the actual cost of collection.").

Section 131.02(A) of the Ohio Revised Code provides generally for the collection of amounts due

to the state. Among other things, the statute authorizes the state to certify to the Attorney General the amounts outstanding so that the Attorney General can collect the debts. *Id.* In addition, the statute permits the Attorney General to "assess the collection cost to the amount certified in such manner and amount as prescribed by the attorney general." *Id.* It is noteworthy that "collection costs," i.e., the amounts the Attorney General spends to collect the debt, are what is authorized. This provision is meant to compensate for actual costs incurred and there is no authorization of punitive or usurious fees. Another provision that the collections special counsel tend to cite in support of their extraordinary fees is section 109.081 of the Ohio Revised Code, which provides that "[u]p to eleven per cent of all amounts collected by the attorney general, whether by employees or agents of the attorney general or by special counsel ... shall be paid into the state treasury to the credit of the attorney general claims fund[.]" The plain language of this section makes clear that what is authorized is for a portion of the amounts collected to be deposited into the fund created. The percentage authorized is not meant to be added on top of the principal. Nonetheless, the collections special counsel have seized upon both sections 109.08 and 131.02(A) as justification for their fees, despite the fact that courts have ruled those fees excessive and not authorized by these sections.

In *Broschak*, the court denied the collections special counsel's attempt to levy what would have amounted to an almost 80 percent fee as "collection costs" and attorneys' fees. Rejecting the collections

special counsel's attempt to rely on section 109.08, the court explained that "[t]here is nothing in R.C. 109.08 that entitles Plaintiff or the Attorney General to an award from this Court of attorneys' fees against Defendant or collection costs representing the fees to be paid to special counsel." 12CVH-09-11545, Magistrate's Decision at 14. The court further explained that the percentage authorized by section 109.08 was to come *out of*, not *on top of*, the principal of the debt: "Instead special counsel, pursuant to R.C. 109.08, is to be paid from the funds collected by them from the claims that are certified, which in this case amount to $28,500.00 in compensatory damages." *Id.* The court also rejected the collections special counsel's reliance on section 131.02, again pointing out that the collection costs authorized by that section were to come out of the principal, not to be added on top of the principal. *Id.* at 15. Accordingly, the court denied almost all of the fees that the collections special counsel had sought and allowed only $2,850.00 to be taken out of the $28,500.00 owed and paid to the Attorney General, not the special counsel. *Id.* at 15-16.

Similarly, in *Columbus City School District v. Hunter*, the court denied the collection special counsel's attempt to unilaterally levy attorneys' fees disguised as collection costs. No. 14CVH-8323, Magistrate's Decision (Franklin Cty. C.P Ohio Civ. Div. Jan. 28), *aff'd* No. 14CVH-8323, Judgment Entry & Notice of Final, Appealable Order (Franklin Cty. C.P Ohio Civ. Div. Mar. 5, 2015). The court ruled that "R.C. 109.08 does not provide any support for Plaintiff's claim for collection costs that are, in fact, as Plaintiff admits on pages 2 and 3 of its brief,

the attorney's fees of special counsel..." Rejecting the collections special counsel's invocation of Section 109.08 and implicit reliance on section 131.02, the court ruled that "R.C. 109.08 makes clear that special counsel is to be paid for their services from the funds collected by them on behalf of their client, not as part of a separate award by the Court or collection costs sought under another provision of the revised code." Magistrate's Decision at 6.

Although the individuals targeted in *Broschak* and *Hunter* were able to challenge and overturn these excessive fees, it is not difficult to imagine that many more individuals in their position merely suffer the injury and pay instead of undertaking the expense and difficulty of litigation. Even when challenged in court, the collections special counsel have been known to appear in court relying on false or misleading affidavits. For instance, the *Broschak* court noted that "[n]either the complaint nor any of its attachments, however, provide any explanation as to how or why Plaintiff is entitled to the claimed collection costs or how such costs were calculated or incurred. Moreover, the affidavit provided in support of the motion for default does not provide any basis for Plaintiff's claimed entitlement to the collection costs." *See* 12CVH-09-11545, Magistrate's Decision at 2. In *Hunter*, the court pointed out that "[n]o explanation was given by Mr. Yono or by Plaintiff in its brief, exhibits and affidavits as to how the claimed collection costs of $3,218.81 was calculated...." No. 14CVH-8323,Magistrate's Decision at 5. The collections special counsel even attempted to assess statutory interest with no basis. *Id.* at 4 (noting that "no explanation was given by

Mr. Yono [the assistant attorney general] at the hearing or by Plaintiff in its brief, exhibits and affidavits as to how the $2,192.08 in claimed statutory interest was calculated." Neither the collections special counsel nor the assistant attorney general were able to explain the fees when called to testify in court. *Id.* If the collections special counsel are engaging in such tactics in court before counsel and learned judges, one can only imagine the antics they employ outside the courts to induce laypeople to pay egregious fees.[3]

In keeping with their status as common debt collectors, the collections special counsel have been found to misrepresent debts, inflate debts with dubious fees, waylay unsuspecting people who do not even owe debts, and even time the individuals' discovery of the debt in such a way as to create pressure and limit the opportunity to challenge these amounts. Their use of the Attorney General's letterhead should not insulate their actions or distract from the fact that they are merely hired hands for whom the state is a client like any other. They are not officers.

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[3] Considering the sharp rebuke that the collections special counsel's fees have drawn and the Attorney General's stance that they are his officers, one might expect the Attorney General to rein them in on this matter. We have not found any evidence that this has occurred, however.

II. Construing the Collections Special Counsel as "Officers" of the State Would Create Perverse Incentives and Facilitate Other Harms

As the FDCPA acknowledges, "[t]here is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692. The FDCPA was enacted to "eliminate abusive debt collection practices by debt collectors" and combat those harms. *Id.* To exempt the collections special counsel from the obligations imposed on "debt collectors" would be to risk undercutting the FDCPA's core objectives.

Specifically, finding that the collections special counsel are officers would risk giving them carte blanche to continue to engage in the abusive practices outlined above and proscribed by the FDCPA. Already, even with the possibility of liability under the FDCPA looming over them, the collections special counsel have been found to utilize dishonest tactics. Removing the FDCPA as a check on their actions could prove disastrous and incentivize worse behavior. Indeed, construing special counsel as "officers" would allow them to engage in a litany of proscribed practices when collecting debts on behalf of the state that they must refrain from when collecting debts on behalf of their private clients. There is no principled reason special counsel should, for example, be permitted to make false representations to debtors about the character,

amount, or legal status of their debts merely because the debt in question is owed to a public entity.

Of equal concern is that exempting the collections special counsel from the FDCPA would encourage the expansion of the program to non-attorney debt collectors. Until now, the Attorney General has relied on licensed attorneys only to serve as special counsel. *See* Pet. App. 24. Qualified attorneys are bound by Ohio's Rules of Professional Conduct, rules enforced by the Supreme Court of Ohio. *See* Ohio State Bar Association, Lawyer Ethics and Discipline, http://tinyurl.com/z5tu49m (last visited Feb. 25, 2016). The Rules "prohibit lawyers from engaging in conduct involving moral turpitude, fraud, deceit, dishonesty or misrepresentation," conduct "prejudicial to the administration of justice," or "any other conduct that adversely reflects on the lawyer's fitness to practice law." *Id.*; Rule 8.4 of Ohio Rules of Professional Conduct, http://tinyurl.com/ltw3y9p (last visited Feb. 25, 2016). While reason exists to doubt that the collections special counsel heed these restrictions, non-attorney debt collectors are not subject to any of these ethical constraints.

Although, until now, the Office of the Attorney General has entered into retention agreements with attorneys only, there is no reason the Office could not enter into comparable contractual arrangements with non-attorney debt collectors. The latter may not be positioned to sue debtors on behalf of the state, but they are equipped to perform the other debt collection functions assumed by special counsel. If the Attorney General's expansive interpretation of

the term "officer" is adopted, non-attorneys in contractual relationships with the Attorney General would be similarly shielded from liability under the FDCPA—and simultaneously unencumbered by the ethical obligations of attorney debt collectors.[4]

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[4] News reports have suggested that the Office of the Attorney General may not be a meaningful source of regulation of the collections special counsel's conduct.

In 2014, certain news organizations began exploring the Attorney General's selection process for the collections special counsel and relationship with those selected. After an extensive investigation, the Dayton Daily News concluded that "[i]n doling out lucrative collections contracts, Ohio Attorney General Mike DeWine passed over more experienced vendors in favor of a friend's new collections agency" and that "[h]is campaign and the state Republican Party received hundreds of thousands of dollars in campaign donations from collectors as they sought work from the state." Laura A. Bischoff, *Vendors Gave Big to DeWine, GOP: Ohio AG Denies Politics Played a Role in Awarding Lucrative Collections Contracts*, DAYTON DAILY NEWS (Jul. 19, 2014, 12:00 AM), http://tinyurl.com/zs4sono. The Associated Press also reached some disturbing conclusions about the selection process, finding that the Attorney General's "selection process for hiring outside law firms has gone essentially undocumented" and that a "public records request by the AP turned up no judges' notes, scoring sheets, email exchanges on firms' qualifications or recommendations made to" the Attorney General. Julie Carr Smyth, *Ohio Attorney General Mike DeWine's Vetting of Law Firms Undocumented*, ASSOCIATED PRESS (Jun. 26, 2014), http://tinyurl.com/jk3cb9b.

The news reports also indicated that, even after selection, the lack of transparency persisted and money continued to change hands. The Dayton Daily News noted an apparent "nexus between how much debt collectors earn and the size of their contributions." Laura A. Bischoff, *Vendors Gave Big to*

Finally, as the brief submitted by no less than seven other states' attorneys general as *amici curiae* indicates, this case may have implications for consumers and debtors nationwide. If this Court exempts the Ohio special counsel program from the anti-deception provisions of the FDCPA, there is every reason to believe that states across the country would move to adopt comparable debt collection programs. The national expansion of such programs would risk profoundly undermining the purposes of the FDCPA, potentially triggering a proliferation of abusive practices by debt collectors with the imprimatur and protection of states' attorneys general, thereby compromising consumer and debtor rights throughout the country.

DeWine, GOP: Ohio AG Denies Politics Played a Role in Awarding Lucrative Collections Contracts, DAYTON DAILY NEWS (Jul. 19, 2014, 12:00 AM), http://tinyurl.com/zs4sono. The newspaper also reported that, between 2010 and when it published its findings, the collections special counsel who contributed in excess of $10,000 received an average of $796,500 in debt collection income between 2011 and 2013, while those contributing under $10,000 received an average of $192,000 during that period. *Id.* In total, the newspaper found that the Attorney General's 119 collections special counsel—including their law firms and family members—contributed $1.38 million to the campaigns of the Attorney General, his son, and the Ohio Republican Party. *Id.*

At a minimum, these allegations raise questions about the nature of the Attorney General's relationship with the collections special counsel and the rationale behind the Attorney General's preferred interpretation of the FDCPA.

CONCLUSION

For the foregoing reasons, *amicus* NHS Consumer Law Center urges the Court to affirm the judgment of the Court of Appeals and hold that the collections special counsel are "debt collectors" under the FDCPA.

Respectfully submitted,

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